Supreme Court, U.S.
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**IN THE**
**SUPREME COURT OF THE UNITED STATES**
**OCTOBER TERM, 1997**

WILLIAM EDWARD TAYLOR

Petitioner,

-vs-

STATE OF MISSOURI

Respondent

ON PETITION FOR WRIT OF CERTIORARI
TO THE WESTERN DISTRICT OF THE
MISSOURI COURT OF APPEALS

# PETITION FOR WRIT OF CERTIORARI TO THE WESTERN DISTRICT OF THE MISSOURI COURT OF APPEALS

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## QUESTIONS PRESENTED FOR REVIEW

1. WHETHER THE MISSOURI COURT OF APPEALS PROPERLY CONSIDERED "INEVITABLE DISCOVERY," WHERE THE ISSUE WAS NEVER RAISED BY THE STATE OF MISSOURI, IN DETERMINING THERE WAS NO PREJUDICE TO PETITIONER CAUSED BY SEIZURES PURSUANT TO A SEARCH WARRANT ISSUED BY A DISQUALIFIED JUDGE, OR WHETHER THIS *SUA SPONTE* CONSIDERATION IMPROPERLY PLACED UPON THE PETITIONER THE BURDEN OF ANTICIPATING AND REFUTING A POSSIBLE "INEVITABLE DISCOVERY" ARGUMENT?

2. WHETHER THE PURPOSE OF THE EXCLUSIONARY RULE, AS RECOGNIZED IN *U.S. V. LEON*, 486 U.S. 154 (1984) WOULD BE SERVED BY ALLOWING A WARRANT TO LAWFULLY ISSUE TO SEIZE EVIDENCE ALREADY SUPPRESSED FOR USE IN THE SAME PROCEEDING IN WHICH THE EVIDENCE WAS SUPPRESSED, AND CONSEQUENTLY, WHETHER A DETERMINATION ON THE BASIS OF "INEVITABLE DISCOVERY UNDER A LAWFUL WARRANT," THAT THERE IS NO PREJUDICE RESULTING FROM THE SECOND SEIZURE SERVES OR DEFEATS THE PURPOSE OF THE EXCLUSIONARY RULE?

3. WHETHER THE PETITIONER, IN A TRIAL FOR FIRST DEGREE MURDER, (DEATH PENALTY WAIVED) WHEREIN THE JURY WAS INSTRUCTED, IN ACCORDANCE WITH STATE LAW, THAT THE ONLY SENTENCE WHICH COULD BE

IMPOSED FOR FIRST DEGREE MURDER WAS LIFE WITHOUT THE POSSIBILITY OF PROBATION OR PAROLE, WAS DENIED DUE PROCESS OF LAW WHEN THE COURT ESSENTIALLY GAVE NO ANSWER TO THE JURY'S INQUIRY AS TO THE "LENGTH" AND MINIMUM TIME TO SERVE FOR PAROLE ELIGIBILITY SHOULD THE DEFENDANT BE SENTENCED TO LIFE IMPRISONMENT FOR MURDER IN THE SECOND DEGREE?

**PARTIES:**

There are no parties to this cause not mentioned in the caption.

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WILLIAM EDWARD TAYLOR

Petitioner,

-vs-

STATE OF MISSOURI

Respondent

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PETITION FOR WRIT OF CERTIORARI TO THE
WESTERN DISTRICT OF THE
MISSOURI COURT OF APPEALS

Petitioner, William Edward Taylor, respectfully prays that this court issue a writ of Certiorari to review the judgment of the Western District of the Missouri Court of Appeals, discretionary review of which judgment was denied by the Supreme Court of Missouri, on May 27, 1997.

## CITATIONS TO OPINIONS

The Opinion of the Western District of the Missouri Court of Appeals in this matter was handed down on February 18, 1997, in case number WD 51906. It is published as *State v. Taylor, 945 S.W.2d 675 no.3,* (Mo. App. 1997). The Order of the Missouri Supreme Court, in case number 79872, denying

Petitioner's Application for Transfer, entered on May 27, 1997, is not published.

## BASIS FOR JURISDICTION

Petitioner seeks review in this court, of a judgment entered by the Western District of the Missouri Court of Appeals, the highest court of the state in which he is entitled to review as of right on the issues raised. The opinion was handed down on February 18, 1997, and a copy of the slip opinion appears at Appendix, P.12.

Petitioner timely moved for rehearing or transfer to the Supreme Court of Missouri, Pursuant to Rules 30.26, and 83.02, Missouri Supreme Court Rules, on March 5, 1997. The Motion and the Suggestions in Support of the Motion appear at Appendix, PP. 21, 26. The Motion was denied on April 1, 1997. A copy of the Notice of the denial of said application appears at Appendix, P. 33.

Petitioner's application for Transfer, filed in the Supreme Court of Missouri, in accordance with Rule 83.03, Missouri Supreme Court Rules, was timely filed on April 16, 1997. The Application and the Suggestions in Support of the Application appear at Appendix PP.34, 43. On May 27, 1997, the Missouri Supreme Court entered its Order denying transfer. A copy of the Notice appears at Appendix P. 50. Under rule 83.02, Missouri Supreme Court Rules, motions for reconsideration of such orders "shall not be accepted or filed."

Because the rights Petitioner claims were denied him are guaranteed by the Constitution of the United States, specifically, the fourth, fifth, and fourteenth amendments thereto, Petitioner claims that this court has jurisdiction to review the judgment by Certiorari under Title 28, U.S.C. § 1257.

## CONSTITUTIONAL PROVISIONS, ETC. INVOLVED IN THE CASE

(Relevant constitutional, statutory and rule provisions, and Approved Criminal Instruction language appear in the Appendix to this Petition)

Fourth Amendment, Constitution of the United States

Fifth Amendment, Constitution of the United States

Fourteenth Amendment, Constitution of the United States

28 United States Code, §1257 (Certiorari Jurisdiction)

§565.020, Revised Statutes of Missouri (First Degree Murder Defined and punishment fixed)

§565.021, Revised Statutes of Missouri (Second degree Murder Defined and punishable as Class "A" felony)

§558.011.1(1), Revised Statutes of Missouri, (Punishment for class "A" felony)

§565.030.2, Revised Statutes of Missouri (Trial procedure, First Degree Murder.)

Missouri Approved Instructions-Criminal, Notes on use 313.00 note 5(A) (2) (Submission of last paragraph of MAI-CR 313.02, punishment, in first stage of trial.)

Missouri Approved Instructions-Criminal 313.02, and Note 3, Notes on use. (Submission of imprisonment for life with out parole in death penalty waived cases)

Rule 30.26, Missouri Supreme Court Rules (Motion for rehearing)

Rule 83.02, Missouri Supreme Court Rules (Motion in Court

of Appeals for Transfer to Missouri Supreme Court)

Rule 83.03, Missouri Supreme Court Rules (Application to Missouri Supreme Court for Transfer from Court of Appeals)

## STATEMENT OF THE CASE

Petitioner was convicted in the circuit court of Nodaway County, Missouri, of murder in the first degree, in violation of Revised Statutes of Missouri, §565.020, and sentenced to life in prison without possibility of probation or parole, Appendix, P. 8, after the prosecution waived the death penalty.

The victim was Petitioner's wife of fifteen years. There was evidence that the marriage had to that point been free of strife, and in support of Petitioner's defense of not guilty by reason of mental disease or defect excluding responsibility, that he had in recent months become a victim of delusional disorder, jealous type, to the extent that he was unable to appreciate the wrongfulness of his actions.

The victim was run over by a combine, apparently activated by a piece of string tied to its "hydrostat lever," enabling Petitioner to pull the lever from a position standing on the ground beside the combine. There was controversy over whether Petitioner's wife crawled under the combine to retrieve the body of a cat, killed and thrown under the combine by Petitioner, or whether the wife was thrown under the combine during or after a struggle with Petitioner. The latter scenario conflicted with the version of the killing told by Petitioner to the defense psychiatrist, and was vigorously argued by the state against the "mental disease or defect" defense.

A substantial portion of the evidence in support of the "struggle theory " advanced by the state came from photographs,

a videotape, and measurements, of the combine itself, which, according to the state, supported a conclusion that certain facial injuries to Petitioner's wife could not have been caused by contact with the ground or the combine while it ran over her in the manner testified to by the defendant. Evidence of this sort was the subject of two defense motions to suppress.

Petitioner's first "Motion to Suppress Physical Evidence" sought the suppression of, inter alia, photographs, diagrams, and reenactments done using the combine, during two searches of Petitioner's premises within the first two days after the killing. (Appendix, P. 57 paragraph 1 (f). After an evidentiary hearing, the court, by letter[1], instructed the Circuit Clerk to prepare a docket entry suppressing "any matters seized by the state during the warrantless searches of November 11 and 12, 1995 (sic for 1994) None of the photos or diagrams may be used; no simulation or testing conducted during these searches may be referred to during the trial." (Appendix, P.61 )

Subsequent to the suppression of the above-mentioned evidence, the state obtained a search warrant to seize the combine, (Appendix P.52), in an *ex parte* proceeding before Nodaway County Associate Circuit Judge Glenn Deitrich, who had previously disqualified himself, *sua sponte,* from the preliminary hearing (Appendix P. 51).

Petitioner filed his second Motion to Suppress, raising various grounds, including that Judge Deitrich having disqualified himself from the cause, any order he issued touching on the same subject matter was void, including the search war-

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[1]Because a motion for change of judge had been granted, Associate Circuit Judge Daniel Czamanske of Platte County, Missouri, was designated to hear the case. He instructed the Clerk by mail as to certain docket entries. This entry was not physically made, but from the way the trial was conducted, it is clear counsel and the court had no doubt as to its efficacy.

rant, and that, because the purpose of the warrant was to recreate evidence suppressed because of the first, illegal search, the information used to obtain the evidence was the "fruit of the poisonous tree." (Appendix 63)

The second Motion to Suppress was overruled. The issue was preserved by objection at trial, and by Motion for Judgment of Acquittal or in the Alternative for New Trial. (Appendix P. 67)

The court submitted verdict directing instructions for First Degree and Second Degree Murder. The Instruction submitting First Degree Murder instructed the jury that, if they found Defendant guilty, they must sentence him to "life imprisonment, without eligibility for probation or parole." (Appendix, P. 84). concerning Murder in the Second degree, the jury was instructed that the permissible sentences were:

1. life imprisonment
2. Imprisonment at a term fixed by you but not less than ten years and not to exceed thirty years.

After three hours of deliberations, the jury inquired of the court as follows:

> "In second degree life imprisonment, how long is a life sentence? of that life sentence, what is the minimum number of years before being eligible for parole?"

To which the Court made the written response,

> "Please be guided by the instructions."

(Appendix, P. 86)

In his Motion for New Trial, Petitioner claimed error in failing to instruct the jury that when sentenced to life imprisonment for Second degree murder, a defendant could not be

released on parole until a minimum of twenty-five years had passed, and that there is no requirement in Missouri law that a person sentenced to life imprisonment ever be released. (Appendix 67 Paragraph 10)

The Missouri Court of Appeals, Western District, did not inquire into the lawfulness of the warrant, because it found that "the information obtained from the combine would have been discovered inevitably by a legitimate search warrant." Appendix P.15.) In his Motion for Rehearing and Transfer filed before the Court of Appeals, and in his Application for Transfer filed in the Missouri Supreme Court, (Appendix P. 21 and 34) Petitioner asserted that by finding "inevitable discovery" without this question ever being raised by the state, the court shifted to him the burden of anticipating and negating this issue, and also questioned whether a lawful warrant can ever issue for evidence suppressed in the same cause.

The Petitioner's timely application for transfer, filed in the Supreme Court of Missouri, which exhausted his remedies in the state courts, was denied on May 27, 1997. (Appendix, P. .50)

## REASONS FOR GRANTING THE WRIT

### I. THIS COURT SHOULD GRANT THE WRIT IN ORDER TO DETERMINE THE PROPRIETY, UNDER *NIX V. WILLIAMS* 467 U.S. 431, AND *BREWER V. WILLIAMS*, 430 U. S. 387, (1977) OF THE RAISING OF THE "INEVITABLE DISCOVERY" EXCEPTION TO THE EXCLUSIONARY RULE *SUA SPONTE* BY AN APPELLATE COURT, AND WHETHER SUCH CONSIDERATION UNFAIRLY RELIEVES THE STATE OF THE BURDEN OF DEMONSTRATING BY A PREPONDERANCE OF THE EVIDENCE THAT EVIDENCE WOULD INEVITABLY HAVE BEEN LAWFULLY DISCOVERED EVEN HAD THE UNLAWFUL QUESTIONING, SEARCH, ETC. INVOLVED NOT TAKEN PLACE.

The Western District of the Missouri Court of Appeals held that regardless of the illegality of the search challenged by defendant, the evidence obtained would have been "inevitably discovered" by obtaining a lawful search warrant. (Appendix, P. 15) Before the Circuit court of Nodaway County, Petitioner objected to the introduction of photographs, measurements, and a videotaped demonstration, involving a combine seized pursuant to a search warrant obtained from a judge who had previously disqualified himself from the case. (Appendix P.51) Petitioner had claimed that disqualification deprived the judge of jurisdiction, under Missouri law, to do any act with relation to the subject matter of the alleged murder of Debra Williams by Petitioner, and that without a lawfully issued warrant, the search was in violation of the Fourth Amendment to the Constitution of the United States

In *Brewer v. Williams,* 430 U.S. 387, (1977) this court

found that certain evidence (the body of the murder victim) had been obtained by the :"functional equivalent of questioning," in violation of the defendant's right to counsel, but because absence of prejudice under the "inevitable discovery" doctrine had been raised, the court did not rule outright that the evidence should have been suppressed. Rather, the court remanded the cause in order to give the prosecution the opportunity to demonstrate by a preponderance of the evidence, that the body would have inevitably been discovered, even without the illegally obtained statement. Eventually, in *Nix V. Williams,* 467 U.S. 431, (1984) the court considered the evidence submitted in support of "inevitable discovery," including a massive search for the victim or her body, and found it sufficient to support a determination by the preponderance of the evidence that the body would inevitably have been found.

In both *Williams* cases, this court placed the burden of demonstrating "inevitable" discovery on the prosecution. It is submitted that the Western District of the Missouri Court of Appeals placed no burden whatsoever on the prosecution in this case, but, in fact, placed on the Petitioner the burden of anticipating and refuting "inevitable discovery," despite the fact that this theory was never raised by the state.

The Missouri Court of Appeals presented another reason to find "no prejudice" in the failure to suppress the evidence obtained in the search. The Petitioner suggests that it should not preclude this court from considering the "inevitable discovery" question, because it is patently illogical.

As noted, in the Statement of the case, Petitioner's mental disease or defect defense was seriously undermined by the prosecution's theory that his wife was thrown or pushed under the combine after a struggle. The Western District of the Missouri Court of Appeals noted that the state presented expert

witnesses who testified to their conclusions that Petitioner did not suffer from a mental disease or defect excluding responsibility (Appendix, P.12) , and used the presence of these witnesses as a further grounds for its determination that defendant was not prejudiced by the evidence supporting the "struggle theory." It is suggested that there is no logic to such a determination. The psychiatric or psychological witnesses presented by the state testified to conclusions different from those expressed by Petitioner's expert, based on essentially the same facts he relied upon, and upon their own examinations of the Petitioner. They did not give any testimony to refute the facts on which Petitioner's expert based his opinion,.

It was the search and seizure which made possible testimony supporting the "struggle theory." That is the prejudice suffered; and it is not cumulative to the state's expert testimony on mental disease or defect. This court should consider the propriety of a *sua sponte* appellate determination that evidence would have "inevitably" been discovered

## II. THIS COURT SHOULD GRANT THE WRIT IN ORDER TO EXAMINE WHETHER OR NOT EVIDENCE, ONCE EXCLUDED BECAUSE UNLAWFULLY OBTAINED, SHOULD BE ALLOWED TO BE INTRODUCED IN THE SAME PROCEEDING, OR WHETHER IT WOULD MORE APPROPRIATELY SUIT THE PURPOSE OF THE EXCLUSIONARY RULE IF EVIDENCE UNLAWFULLY SEIZED, AND EXCLUDED FOR THAT REASON, COULD NEVER BE INTRODUCED IN THE SAME PROCEEDING.

In Petitioner's Brief on Appeal, he pointed out the questionable propriety under the Fourth Amendment, of using in a proceeding, evidence once suppressed in the same proceeding

as illegally obtained. (Appendix, P. 82), noting that such practices as obtaining a subpoena for records, where an undercover agent's testimony about those records had been suppressed, (*United States v. Lipschitz*, 148 Fed. Supp. 774, (E.D.N.Y, ;1957)), or attempting to validate an unlawful search by getting an ostensibly lawful warrant after the fact, *State v. Hicks*, 707 P. 2d. 531, (Az App., 1958),. *Thomas v. State*, 220 P. 977 (Ok. Crim App. 1932). See also *People v. Scaramuzzo*, 185 N.E. 578, (Ill. 1983); *Commonwealth v. Black*, 576 A. 2d., 423; *People v. Rocha*, 312 N.W.2d 657 (Mich., 1981); *State v. DeLane*, 503 A.2d. 903 (N.J. ); *Stewart. v. State*, 681 S.W.2d 774 (Tex. ) had been condemned.

This court's decision in *United States v. Leon* 468 U.S. 897 (1984) determined that decisions concerning the exclusion of evidence should be based on a common-sense approach to the question of whether suppression would further the purpose of the rule, which is to deter unlawful conduct by the authorities. Where the conduct is such that the court determines the evidence should be suppressed, the deterrent impact would clearly be undermined, by allowing the state another opportunity to seize and introduce the evidence. Allowing the authorities a chance to "make up for" an unlawful search by later following the rules substantially undermines the protection against a first unlawful search.

The trial Court here had found that two prior entries onto Petitioner's property had been unlawful searches, and suppressed evidence obtained. (Appendix P. 61) The state was permitted to essentially introduce the very same evidence by, after the suppression, getting a warrant and searching for Petitioner's combine. Because the state essentially lost nothing by its unlawful activity, there could be no lasting deterrence.

## III. THIS COURT SHOULD GRANT THE WRIT IN ORDER TO REVIEW WHETHER DUE PROCESS REQUIRES THAT WHERE THE GREATER OFFENSE SUBMITTED CARRIES A SENTENCE OF LIFE IMPRISONMENT WITHOUT PAROLE, AND THE JURY IS SO INSTRUCTED BY THE VERDICT DIRECTING INSTRUCTION ON THAT OFFENSE, THE JURY ALSO BE INSTRUCTED THAT A LIFE SENTENCE FOR THE LESSER OFFENSE SUBMITTED CARRIES A SUBSTANTIAL MINIMUM TERM TO SERVE BEFORE PAROLE.

For offenses committed before August 28, 1994, in Missouri, a person sentenced to life imprisonment, who had no prior felony convictions, was required to serve a minimum of fifteen years imprisonment before becoming eligible for parole. Revised Statutes of Missouri, (repealed) 558.019.3. In the version of that statute which became effective August 18, 1994, it was required that persons sentenced for dangerous felonies, including second degree murder, must serve 85% of their sentence before being paroled. Life imprisonment was to be treated as a thirty-year sentence for such purposes. Thus, if Appellant had been convicted of Second Degree Murder, rather than First Degree Murder, he would have been required to serve a minimum of twenty-five and one half years before becoming eligible for parole.

As required by Revised Statutes of Missouri, §565.030, (Appendix P. 3), in Death Penalty Waived cases, guilt and punishment were submitted to the jury together, and the verdict-directing instruction, (Appendix P. 84) included a paragraph required by Missouri Approved Instructions, 313.00 notes on Use, (Appendix P. 7) and Missouri Approved Instruction 313.02, (Appendix P. 7) which advised the jury that if it found defen-

dant guilty, they must assess punishment at life imprisonment without the possibility of probation or parole. The verdict director for Second Degree murder, (Appendix, P. 85), as in all non-capital offenses, informed the jury that it could impose a life sentence, but made no mention of parole. (App. P.85)

In *Simmons v. South Carolina*, 512 U.S. 154 (1994) the court remarked that it is "impossible to ignore "the reality, known to the `reasonable juror,' that, historically, life term defendants have been eligible for parole." Where one instruction tells the jury it can impose life, without the possibility of parole, and the other mentions only life, it is even harder to ignore the jury's probable conclusion that parole would be possible if Petitioner were convicted of Murder in the Second Degree.

Here, the jury's inquiry made it obvious that the jury was considering a second degree murder conviction instead of first degree murder; that it *was* aware of a possibility of parole , and concerned with the possibility of an early parole. (Appendix P. 86) One might also add to the quote from *Simmons* that the "reasonable juror" will usually underestimate the length of time which will be served prior to parole. The change in Missouri law, effective just months before this offense occurred, makes it even more likely that those who "knew something" about "how long a life sentence really is" would underestimate the probable minimum time served.

In a situation similar to that in *Simmons*, supra, the Missouri Supreme Court recognized the due process implications to a capital defendant where the jury is allowed to consider the possibility of parole from a life sentence. *State v. Cornett,* 381 S.W.2d., 878, (Mo. 1964). After the reversal of the death sentence in *Cornett,* Parole was not mentioned to Missouri Juries, except for the first degree murder instruction which, as noted above, informs the jury that if the defendant is not sentenced to

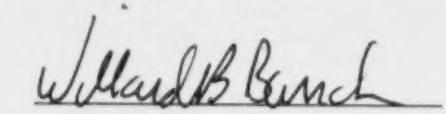
death, he will be sentenced to life imprisonment without the possibility of parole.

*Simmons* held that a capital defendant can be deprived of due process, under certain circumstances, when a jury is not told that the alternative life sentence would be served without parole. In this death penalty waived case, the jury necessarily knew that the Petitioner would have been eligible for parole if convicted of second degree murder, rather than first degree murder. It is submitted that by permitting the jury to continue deliberations after its inquiry, without informing it of the mandatory minimum term Petitioner would face if convicted of second degree murder and sentenced to life, the court deprived this Petitioner of due process of law, as guaranteed by the Fifth and Fourteenth Amendments to the Constitution of the United States, by chilling the jury's consideration of the lesser offense; Certiorari should be granted to define when a non-capital defendant's due process rights are violated by failure to instruct on minimum prison terms.

## CONCLUSION

For the foregoing reasons, Petitioner prays that a writ of certiorari issue to review the judgment of the Western District of the Missouri Court of Appeals.

RESPECTFULLY SUBMITTED



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# APPENDIX TO PETITION FOR WRIT OF CERTIORARI TO THE WESTERN DISTRICT OF THE MISSOURI COURT OF APPEALS

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## PROVISIONS OF CONSTITUTIONS, STATUTES AND COURT RULES INVOLVED IN THE CASE

### CONSTITUTION OF THE UNITED STATES

**AMENDMENT IV.**

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

**AMENDMENT V.**

No person shall be ... deprived of life, liberty, or property, without due process of law; ...

**AMENDMENT XIV.**

§ 1. Citizenship rights not to be abridged by states

...No State shall ... deprive any person of life, liberty, or property, without due process of law;...

### STATUTES OF THE UNITED STATES

**TITLE 28 USC § 1257**

(a) Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court by writ of certiorari where the validity of a treaty or statute of the United States is drawn in question or where the validity of a statute of any State is drawn in question

on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, or where any title, right, privilege, or immunity is specially set up or claimed under the Constitution or the treaties or statutes of, or any commission held or authority exercised under, the United States.

## STATUTES OF THE STATE OF MISSOURI

Revised STATUTES of Missouri, § 565.020. First degree murder, penalty person under sixteen years of age not to receive death penalty.

1. A person commits the crime of murder in the first degree if he knowingly causes the death of another person after deliberation upon the matter.

2. Murder in the first degree is a class A felony, and the punishment shall be either death or imprisonment for life without eligibility for probation or parole, or release except by act of the governor; except that, if a person has not reached his sixteenth birthday at the time of the commission of the crime, the punishment shall be imprisonment for life without eligibility for probation or parole, or release except by act of the governor.

Revised STATUTES of Missouri, § 565.021. Second degree murder, penalty.

1. A person commits the crime of murder in the second degree if he:

   (1) Knowingly causes the death of another person or, with the purpose of causing serious physical injury to another person, causes the death of

another person; or

(2) Commits or attempts to commit any felony, and, in the perpetration or the attempted perpetration of such felony or in the flight from the perpetration or attempted perpetration of such felony, another person is killed as a result of the perpetration or attempted perpetration of such felony or immediate flight from the perpetration of such felony or attempted perpetration of such felony.

2. Murder in the second degree is a class A felony, and the punishment for second degree murder shall be in addition to the punishment for commission of a related felony or attempted felony, other than murder or manslaughter.

Revised STATUTES of Missouri, § 558.011. Sentence of imprisonment, terms conditional

1. The authorized terms of imprisonment, including both prison and conditional release terms, are:

(1) For a class A felony, a term of years not less than ten years and not to exceed thirty years, or life imprisonment;

Revised STATUTES of Missouri, § 565.030. Trial procedure, first degree murder.

1. Where murder in the first degree is charged but not submitted or where the state waives the death penalty, the submission to the trier and all subsequent proceedings in the case shall proceed as in all other

criminal cases with a single stage trial in which guilt and punishment are submitted together.

* * *

4. If the trier at the first stage of a trial where the death penalty was not waived finds the defendant guilty of murder in the first degree, a second stage of the trial shall proceed

* * *

If the trier is a jury it shall be instructed on the law ...The trier shall assess and declare the punishment at life imprisonment without eligibility for probation, parole, or release except by act of the governor:

(1) If... [four conditions requiring or permitting a life sentence instead of death omitted]

588.019

3. Other provisions of the law to the contrary notwithstanding, any defendant who has pleaded guilty to or has been found guilty of a dangerous felony as defined in section 556.061, RSMo, and is committed to the department of corrections shall be required to serve a minimum prison term of eighty-five percent of the sentence imposed by the court or until the defendant attains seventy years of age, and has served at least forty percent of the sentence imposed, whichever occurs first.

4. For the purpose of determining the minimum prison term to be served, the following calculations shall apply:

(1) A sentence of life shall be calculated to be thirty

years;

Revised Statutes of Missouri, § 556.061. Code definitions.

(8) "Dangerous felony" means the felonies of arson in the first degree, assault in the first degree, forcible rape, forcible sodomy, kidnapping, murder in the second degree and robbery in the first degree;

558.019 (Repealed, effective August 24, 1994)

3. If the defendant has no prior felony convictions and has pleaded guilty to or has been found guilty of a felony and sentenced to life imprisonment, the minimum prison term which the defendant must serve shall be fifteen years.

## MISSOURI SUPREME COURT RULES

Missouri Supreme Court Rules, RULE 30.26 MOTIONS FOR REHEARING

A motion for rehearing shall briefly and distinctly state the grounds upon which a rehearing is sought. It may be accompanied by suggestions in support containing citation of authorities. The motion shall be filed within fifteen days after the opinion of the court is filed, and the motion and suggestions shall be served on the adverse party or his attorney within that time. If a motion is overruled, no further motion by the same party for rehearing or to set aside the order overruling the motion for rehearing may be filed.

Missouri Supreme Court RULE 83.02 TRANSFER ON ORDER OF COURT OF APPEALS

A case in which an opinion or order of dismissal has been filed in a district of the court of appeals may be transferred to this Court by order of a majority of the participating judges, regular and special, on their own motion or on application of the party, because of a general interest or importance of a question involved in the case or for the purpose of reexamining existing law. Application by a party for such transfer shall be filed within fifteen days of the date on which the opinion or order of dismissal is filed. No response to an application for transfer shall be filed unless requested by the court, and an order for transfer shall not be granted in the absence of such a request.

RULE 83.03 TRANSFER BY SUPREME COURT AFTER OPINION BY COURT OF APPEALS

In any case in which an application for transfer under Rule 83.02 has been denied, the case may be transferred by order of this Court on application of a party for any of the reasons specified in Rule 83.02, or for the reason that the opinion filed is contrary to a previous decision of an appellate court of this state. Application for such transfer shall be filed inn this Court within fifteen days of the date on which transfer was denied by the court of appeals. No response to an application for transfer shall be filed unless requested by the Court. Motions for reconsideration of the Court's action in refusing an application for transfer shall not be accepted or filed.

**MISSOURI APPROVED CRIMINAL INSTRUCTIONS, 3D.**

Missouri Approved Instructions-Criminal, Notes on use 313.00 note 5(A) (2)

If murder in the first degree is submitted to the jury with the death penalty waived, the last paragraph of the verdict director on murder in the first degree (relating to punishment) will be given. Section 565.,030.1, RSMo 1986

Missouri Approved Instructions-Criminal 313.02, and Note 3, Notes on use.

* * *

(If you do find the defendant guilty (Under Count ___) of murder in the first degree, you are to assess and declare the punishment at imprisonment for life without eligibility for probation or parole [See notes on use 3 for when this paragraph should be used and when it should be omitted.])

## Notes on Use

* * *

3. One of the possible penalties for murder in the first degree is death. When the death penalty has not been waived the last paragraph of the instruction will not be used. If the death penalty has been waived, the inclusion of the reference to punishment will depend on whether the jury will assess and declare the punishment.

**IN THE CIRCUIT COURT OF**
**NODAWAY COUNTY, MISSOURI**
**FOURTH JUDICIAL CIRCUIT**

**STATE OF MISSOURI**

**Plaintiff,**

**vs.**

**Case No. CR894-481F**

**WILLIAM E. TAYLOR,**

**Defendant.**

## JUDGMENT

NOW ON THIS 3rd DAY OF NOVEMBER, 1995, COMES the State of Missouri by David Cosgrove, Special Prosecuting Attorney, and the Defendant appears in person, in custody, and with counsel Will Bunch and Zel Fischer.

Trial by jury was held commencing August 21, 1995 and concluding August 26, 1995. Docket entries for said dates are included herein by reference.

A jury comprised of 12 members and 1 alternate member, namely:

| | |
|---|---|
| Bill R. Job | Rebecca S. Mercer |
| John Ray Strand | Larry C. Baldwin |
| Raymond Negaard | Sandra L. Anderson |
| Dianna E. Logan | Penny F. Auffert |
| Richard L. Sloan | Kari Lee Elshaug |
| Beverly Jean Blackford | Alicia R. Lewis |

Donna L Acklin, Alternate

was sworn to try the fact issues. The jury returned its verdict on August 26, 1995 finding the defendant William Taylor guilty

of murder in the first degree and assessed his punishment at imprisonment for life without eligibility for probation or parole.

A one page supplement to the Presentence Investigation Report was filed by Tom Seipel of the Missouri State Probation and Parole Office. Counsel commented upon the original report filed October 24, 1995 and the supplement filed this date. Same having been received and considered, no evidence heard thereon, Court considers that no application for parole or probation may be permitted herein, and any such application is denied.

No statements of victims were made; counsel for the State did comment on behalf of the deceased's family members.

The Defendant read a prepared statement to the Court and members of the family of the deceased.

The Court read the Verdict of the Jury. The Defendant and his counsel were asked if there was any legal cause to show why judgment and sentence should not now be pronounced.

IT IS HEREBY ORDERED AND ADJUDGED THAT THE DEFENDANT WILLIAM E. TAYLOR IS SENTENCED, COMMITTED AND CONFINED FOR THE REMAINDER OF HIS NATURAL LIFE, WITHOUT ELIGIBILITY FOR PROBATION OR PAROLE, FOR THE OFFENSE OF FIRST DEGREE MURDER. SAID LIFE SENTENCE, WITHOUT ELIGIBILITY FOR PROBATION OR PAROLE, TO BE ENDURED IN SUCH PLACE OF CONFINEMENT AS MAY BE DESIGNATED BY THE MISSOURI DEPARTMENT OF CORRECTIONS, TO WHOM THE DEFENDANT IS ORDERED COMMITTED.

No appeal bond is permitted. Probation is denied. No parole shall ever be granted to the Defendant William E. Taylor.

The Defendant is sworn and examined pursuant to Rule 29.15. Defendant is advised of his rights under Rule 29.15, and defendant and his counsel Mr. Bunch are each delivered a photocopy of Rule 29.15. The Court finds no probable cause to believe that Defendant has received ineffective assistance of counsel. Defendant advised of his right to appeal per Rule 30.

The costs hereof are assessed against the Defendant. The State of Missouri is granted a judgment against the Defendant for the sum of $68 for the Crime Victims Compensation Fund.

IT IS SO ORDERED:

_____

DANIEL M. CZAMANSKE, JUDGE.

**STATE OF MISSOURI,**

**Respondent,** **WD 51906**

**v.** **Filed: February 18, 1997**

**WILLIAM TAYLOR,**

**Appellant.**

## APPEAL FROM THE CIRCUIT COURT OF NODAWAY COUNTY

**The Honorable Dan Czamanske, Special Judge**

A jury convicted William Taylor of first degree murder in his wife's death on November 10, 1994. Part of the evidence used to convict him was his admission that he caused his wife's death by running over her with a combine on the couple's farm in Nodaway County. On appeal, he charges the circuit court with four errors: (1) not suppressing inadmissible evidence; (2) allowing inadmissible testimony by the county coroner; (3) wrongly limiting defense counsel's cross-examination; and (4) inadequately responding to a jury question. We do not find reversible error, and we affirm the judgment of conviction.

Taylor does not dispute the sufficiency of the evidence to sustain his conviction. A jury convicted him of killing his wife, Debra Taylor. The evidence supported a theory that Taylor killed his wife by using the family's cat to lure his wife underneath a combine and causing the combine to roll over her, but the jury also heard evidence suggesting that Taylor killed his wife before he put her body under the combine.

Taylor admitted to his brother that he had killed the cat with a hammer and threw it under the combine to lure his wife under the machine. He told his brother that he used twine to pull a lever on the combine to cause it to roll over his wife

when she tried to retrieve the cat. He told his brother that he had moved the combine back from his wife's body and hid the twine.

Taylor's brother reported this to the sheriff who interviewed Taylor. Taylor admitted causing his wife's death because he was depressed and believed that his wife wanted a divorce. He explained that he had intended to use twine to pull back on the combine's hydrastat lever, but that he panicked when he saw his wife crawl under the combine. He said that he did not attempt to pull the lever to stop the combine, but that he tried to grab his wife before being run over himself. He said that he had killed the cat before putting it under the combine.

The next day, law enforcement officers returned to Taylor's farm and took photographs and measurements, including measurements of the combine. They found a piece of twine near where Debra Taylor had been lying the previous evening. They seized the cat's corpse.

The coroner examined the cat and found bruising on its neck. The cat's skin was unbroken and had no other apparent sign of injury. The coroner concluded that the cat's death resulted from being hit with a rounded object. He disposed of the corpse after examining it.

A pathologist did an autopsy on Debra Taylor the day after she died. His examination determined that a blunt force had caused lacerations to her forehead and had bruised her left eye. She had contusions on her chest, fractured ribs on the left side and a crushed pelvis. The pathologist concluded that her facial injuries were not consistent with her being run over by a combine. He opined that a blow to her face was inflicted by something other than the combine and that the blow caused her death.

In July 1995, authorities obtained a search warrant and returned to Taylor's farm to remeasure the combine. They found the combine in a shed on property belonging to Taylor's father, Charles Taylor, and less than a mile from William Taylor's house. After seeing the combine in the shed, officers went to Charles Taylor's home, gave him a copy of the warrant, and asked him to unlock the shed. Charles Taylor complied. Officers moved the combine to a nearby John Deere facility to measure it and to photograph it. They videotaped this procedure.

The state charged William Taylor with first degree murder. He presented evidence at trial but did not testify. His defense was that he suffered a delusional disorder which made him unable to appreciate the nature and wrongfulness of his actions. The jury found him guilty as charged, and the circuit court sentenced him to life in prison without probation or parole. In his first point on appeal, Taylor complains that the circuit court did not suppress evidence obtained pursuant to the July 1995 search warrant. He does not mention in his point relied on what evidence he believes should have been suppressed. In his argument, he referred to his second motion in which he asked the court to suppress a "John Deere combine, and a videotaped demonstration, experiment, or reenactment conducted with the use of said combine[.]" He attacks the search warrant on the ground that the judge who issued it had previously disqualified himself from the case. He also claims the affidavit supporting the search warrant was defective and that the seized evidence constituted "fruit of the poisonous tree." The state responds in part that Taylor has no standing to assert that officers conducted an unreasonable search and seizure because officers seized it from the barn on the farm of Taylor's father, not from a barn on Taylor's property.

We need not resolve the matter because we do not dis-

cern any prejudice to Taylor. Assuming for the sake of our consideration that the warrant was defective, the state may use evidence obtained in violation of a defendant's constitutionally-protected privacy interest if it proves that the evidence would have inevitably been discovered by lawful means. *Nix* v. *Williams,* 467 U.S... 431 (1984); *State v. Butler,* 676 S.W.2d 809, 812 (Mo. banc 1984). Moreover, an error in the admission of evidence does not necessarily mandate a reversal of a conviction. "Only prejudicial error is reversible error." *State v. Tettamble,* 720 S.W.2d 741, 742 (Mo. App. 1986). If the state presented other evidence establishing essentially the same facts as the improperly admitted evidence, Taylor has suffered no prejudice and no reversible error. *State v. Straw,* 915 S.W.2d 775, 783 (Mo. App. 1996); *State v Garrette,* 699 S.W.2d. 468, 503 (Mo. App. 1985).

Taylor first says that he was prejudiced because the evidence constituted "fruit of the poisonous tree" from an earlier warrantless search declared illegal by the circuit court. The circuit court granted Taylor's motion to suppress filed on June 2, 1995, and ordered the suppression of any evidence, including photographs, seized from Taylor's property on November 11 and 12, 1994 (the two days immediately after the mishap), and the officers' attempt to use twine to activate the combine.

In making his "fruit of the poisonous tree" argument,

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[1]Rule 25.06(A) says, "Subject to constitutional limitations, the state may make a written motion in the court having jurisdiction to try the case requesting the defendant to disclose material and information not covered in Rule 25.05. Such motion shall specify the material or information sought to be disclosed. If the court finds the request to be reasonable, the court shall order the defendant to disclose to the state that material and information requested which is found by the court to be relevant and material to the state's case."

[2]Rule 26.02(b) authorizes the issuance of a subpoena to compel the production of "books, papers, documents or other objects[.]"

Taylor claims that the July 1995 search warrant depended on information obtained by officers during their warrantless search in November. We disagree. Before the officers' investigation on November 11 and 12, they were aware of the combine and its involvement in Debra Taylor's death because of the original "accident" investigation and because of Taylor's confession. Taylor's confession would have led the officers' to the combine regardless of the information obtained during the warrantless search.

Moreover, even if the search warrant was invalid because it was issued by a judge who had disqualified himself from the case, the information officers obtained from the combine would have been discovered inevitably by a legitimate search warrant. Taylor told them that he had used twine to cause the combine to roll over his wife. That independent, untainted source would have inevitably led them to the information obtained in the July 1995 search. Hence, the inevitable discovery rule of Nix made the evidence available to the state for use against Taylor. Taylor suffered no prejudice because officers would have obtained information about the combine inevitably.

Taylor next argues that he was prejudiced because the state did not attempt to obtain the combine pursuant to discovery rules 25.06[1] and 26.02.2[2] He suggests that use of these discovery procedures would have avoided any surprise. Taylor cites no authority to support the proposition that the discovery rules were the exclusive means by which to discover the combine. Moreover, Taylor can hardly claim surprise that the state would want to examine the combine after he admitted using it to kill his wife.

Taylor then complains that the search and seizure of the combine rendered his mental disease and defect defense less

effective. He asserts that the officers' measurements and videotape taken of the combine disputed any notion that Debra Taylor's facial injuries were caused by the combine. This allowed the state to argue that she may have struggled with her husband before dying.

Evidence independent of the officers' measurements and study of July 1995 also contradicted Taylor's assertion that he suffered a mental disease or defect. Several mental health physicians who had evaluated Taylor testified of their conclusion that he was not suffering from a delusional disorder or mental disease which would have precluded him from appreciating the wrongfulness of his conduct.

Taylor next asserts that the July 1995 search led to testing which permitted the state to assert that Debra Taylor may have struggled with Taylor before her death, and this diminished the persuasiveness of his mental disease or defect defense. Although the county coroner testified that the results of the July 1995 measurements confirmed his conclusion that Debra Taylor's facial injuries were not caused by the combine, the jury heard the same evidence from another source. A pathologist who performed an autopsy on Debra Taylor testified that her facial injuries were consistent with a blow to the face and were inconsistent with a theory that she had been run over by a combine. Taylor himself presented medical testimony which rebutted the so-called "struggle theory."

Taylor's second point complains that the circuit court erred in prohibiting him from cross-examining Debra Taylor's psychologist about problems she had with other family members and in prohibiting Taylor's introducing her treatment records. Taylor claims the jury heard a distorted picture of Debra Taylor's treatment because it heard testimony concerning her marital problems but did not hear about problems she had with

other family members.

A trial court has considerable discretion in determining the relevancy of evidence and the extent of cross-examination. *State v. Garrett, 813* S.W.2d 879, 882 (Mo. App. 1991). We will not interfere with the circuit court's ruling on whether or not to admit evidence unless we discern a clear abuse of discretion. *State v. Childress,* 805 S.W.2d 729, 730 (Mo. App. 1991).

During cross-examination, Taylor began questioning the psychologist about discussions he had with Debra Taylor regarding other family members. The state objected on relevancy grounds and pointed out that the parties had previously stipulated that this matter would not be raised at trial. The circuit court sustained the objection. A brief time later, Taylor mentioned Debra Taylor's relationship with her mother. The circuit court interrupted to discuss what the parties had agreed to and to question the relevancy of the evidence. The court pointed out that the parties had made an oral stipulation concerning this matter and found it to be binding for the entire case.

Stipulations are generally controlling, conclusive and binding on the courts. *See Griffin Contracting Company v. Hawkeye- Security Insurance Company,* 867 S.W.2d 602, 605 (Mo. App. 1993). Because the rules of contracts apply, we construe a stipulation in terms of the surrounding circumstances and the intent of the parties. *Ezenwa v. Director of Revenue,* 791 S.W.2d 854, 859 (Mo. App. 1990). Although relief from a stipulation may be granted in some circumstances, courts should never grant relief simply because the case went contrary to the expectations of one of the stipulators. *State v. Ward,* 745 S.W.2d 666, 671 (Mo. banc 1988).

In this case, the circuit court recited the terms of the stipulation on the record, outside the presence of the jury:

THE COURT: . . . Again, to be clear, I understood there was an agreement at the bench at the commencement of trial that no reference to the mother and their relationship that she had with the victim as well as no reference to an abortion of the victim?

[DEFENSE ATTORNEY]: Correct.

THE COURT: Is that correct . . . with what you all stipulated to?

[PROSECUTING ATTORNEY]: Yes, your Honor.

[DEFENSE ATTORNEY]: Yes.

THE COURT: And the Court interprets that, for the record, the same, to apply not only while—with not only the case in chief but to the rebuttal or surrebuttal, whatever, the entire State versus Taylor, I felt that stipulation was in effect. That's one of the reasons that I'm sustaining the State's objection to any further inquiry, as I did on the bench.

In his brief, Taylor acknowledges, "Absent the stipulation, there is no support for the court's action sustaining the state's objection." The parties had stipulated that they would not mention Debra Taylor's relationship with her mother. Taylor confirmed that the circuit court's recitation of the stipulation was correct and that the parties agreed not to mention such matters. We find no conditional language that the agreement applied only to the case in chief, as Taylor now claims to have been his understanding. The circuit court did not err in limiting the questioning as to the stipulated matters.

In his final point, Taylor complains that the circuit court erred in responding to a jury question submitted during deliberations. The question asked, "In second degree life imprisonment,

how long is a life sentence? Of that life sentence, what is the minimum number of years before being eligible for parole?" The circuit court's answer directed the jury to refer to its instructions.

Because Taylor did not preserve this issue for our review, we can review it, if at all, only as plain error under Rule 30.20. We decline plain error review. Taylor affirmatively waived our review of the issue when he indicated to the circuit court that he had no objection to the court's proposed response. *See State v. Zelinger,* 873 S.W.2d 656, 660 (Mo. App. *1994); State v. Scott, 858* S.W.2d *282, 285* (Mo. App. 1993).

For these reasons, we affirm the circuit court's judgment of conviction.

Paul M. Spinden, Judge

Smart, P.J., and Ellis, J., concur.

**IN THE MISSOURI COURT OF APPEALS,**
**WESTERN DISTRICT**

| | | |
|---|---|---|
| **STATE OF MISSOURI** | ) | |
| **Plaintiff-Respondent** | ) | |
| | ) | |
| **V.** | ) | **No WD 51906** |
| | ) | |
| **WILLIAM TAYLOR** | ) | |
| **Defendant-Appellant** | ) | |

## MOTION FOR REHEARING, OR IN THE ALTERNATIVE, APPLICATION FOR TRANSFER TO THE SUPREME COURT OF MISSOURI

COMES NOW APPELLANT, by and through the undersigned, and moves the court to rehear the cause, or to transfer the cause to the Supreme Court of Missouri:

**I. Transfer is sought because of the following matters:**

1. Matters of general importance, wherein the law should be reexamined:

   a) Error in placing the burden of negating "inevitable discovery," never claimed by the state, on the defendant.

   b) The court's assumption that a search warrant can lawfully issue for items once suppressed in the same case.

   c) Whether introduction of evidence obtained by a warrant issued by a disqualified judge is prejudicial in itself.

   d) Whether corroborating evidence can be preju-

dicial.

e) Whether a stipulation should be allowed to deprive a defendant of the right of confrontation on an entire subject, where there is strong evidence of mistake.

f) Whether it is plain error not to instruct on the law with respect to possible parole from a life sentence, where both first and second degree murder are submitted.

2. Conflict with/misapplication of:

a) Nix V. Williams, 467 U.S. 431 (1984)

b) Brewer v. Williams, 430 U.S. 387 (1977).

c) State v. Whitfield, 837 S.W.2d. 503, (Mo. 1992)

d) State v. Ward, 745 S.W.2d. 666 (Mo. 1988)

e) State v. Cornett, 381 S.W.2d. 64, (Mo. 1964)

f) State v. Stovall, 785 S.W.2d. 853, (Mo. App. 1990)

g) State v. Martin, 671 S.W.2d. 20 (Mo. App. 1984)

**II The court committed the following material errors of law and fact;**

**A.** The court committed a material error of fact, when it stated that the pathologist "opined that ... the blow ['to her face ... inflicted by something other than the combine'] caused her death." (Opinion, page 3, bracketed material inserted from the preceding clause of the opinion), and when it stated that "...the jury also heard evidence suggesting that Taylor killed his wife before he put her body under the com-

bine," (Opinion, p. 1). There was no such opinion expressed, and no such evidence presented.

**B.** The Court committed a material error of fact and/or law, when it determined sua sponte that the evidence would have been "inevitably discovered," without placing on the state the burden of demonstrating by a preponderance of the evidence that the evidence would in fact have inevitably been discovered, as required by Nix V. Williams, 467 U.S. 431 (1984), and Brewer v. Williams, 430 U.S. 387 (1977).

**C.** The court committed a material error of fact and/or law, when it held that the evidence seized pursuant to the void warrant would have been inevitably discovered via a valid search warrant without examining the question of whether evidence, once suppressed, can ever be validly obtained and introduced in the same proceeding.

**D.** The court committed a material error of law and/or fact, when it held that even if the warrant was void because of the disqualification of the Associate Circuit Judge, there was no prejudice in the introduction of evidence seized; overlooking the historic Missouri practice of reversing the results of actions of disqualified judges without looking for further prejudice, such as State v. Stovall, 785 S.W.2d. 853, (Mo. App. 1990) and State v. Martin, 671 S.W.2d. 20 (Mo. App. 1984).

**E.** The court committed a material error of law or fact, when it held that there was independent evidence of the facts "established" by the videotape, photographs, and measurements of the combine, and no

prejudice, in that the "independent evidence" was actually of other "facts;" and, as recognized in State v. Whitfield, 837 S.W.2d. 503, (Mo. 1992), graphic and concrete corroborating evidence can be prejudicial.

**F.** The court committed a material error of law and fact, and deprived the Appellant of due process of law, in holding that a stipulation, made by his attorney, who obviously mistook the intentions of the prosecution, could validly preclude him from his right to confront a witness on an entire subject matter.

**G.** The court committed a material error of law and fact when it failed to hold that it was plain error for the court to fail to instruct the jury appropriately that parole is never assured to a person sentenced to life imprisonment, and that a person sentenced to life for second degree murder will not even be eligible for parole for at least twenty-five and one-half years, thus permitting the jury to be pressured to return a verdict for the more sever offense, in violation of the principle announced in State v. Cornett, 381 S.W.2d. 64, (Mo. 1964).

WHEREFORE, IT IS RESPECTFULLY SUGGESTED THAT, because of the material errors of law and fact set forth above, the court should grant a rehearing, and enter its opinion reversing and remanding the judgment of the Circuit Court; and further, if a rehearing is not granted, each of the errors stated in subparagraphs **B** through **G** above is on a matter of general importance, upon which the law should be reexamined, if the law is indeed as this court deems it to be, the cause should be transferred to the Supreme Court of Missouri.

RESPECTFULLY SUBMITTED

Willard B. Bunch # 19527
310 Armour
North Kansas City,
Missouri
64116
(816) 421-4334
FAX (816) 468-7266

## CERTIFICATE OF SERVICE

I certify that a copy of the above and foregoing was mailed this 5th day of March, 1997, to: Office of the Attorney General, Attention Cheryl A. Caponegro, Post Office Box 899, Jefferson City, Missouri, 65102.

Willard B. Bunch

**IN THE MISSOURI COURT OF APPEALS,**
**WESTERN DISTRICT**

| | | |
|---|---|---|
| **STATE OF MISSOURI** | ) | |
| **Plaintiff-Respondent** | ) | |
| | ) | |
| **V.** | ) | **No WD 51906** |
| | ) | |
| **WILLIAM TAYLOR** | ) | |
| **Defendant-Appellant** | ) | |

## SUGGESTIONS IN SUPPORT OF MOTION FOR REHEARING, OR IN THE ALTERNATIVE, APPLICATION FOR TRANSFER TO THE SUPREME COURT OF MISSOURI

COMES NOW APPELLANT, by and through the undersigned, and in support of his Motion For Rehearing, Or In The Alternative, Application For Transfer To The Supreme Court Of Missouri, suggests to the court as follows:

A. The pathologist who examined Debbie Taylor, unequivocally stated that in his opinion her death was caused by "a blunt force injury to the body, crushing sort of injury, which caused intensive internal bleeding and — and fracture." (T. 303). This could not have been her facial injury. He described the facial and head injuries thus: "(T)here's no crushing injuries to the bones of the face. And the radiographs that I reviewed of the face showed no fractures, no temporal bone fracture or any skull fractures whatever," so that when he talks of a "crushing sort of injury" "to the body" causing "intensive internal bleeding," he cannot possibly be talking of the blow to the head. The pathologist never

came close to expressing an opinion that Debbie Taylor was killed by a blow to the face.

Nor is there any evidence of Debbie dying before being run over. Like the pathologist, the coroner also ascribed her death to "extensive internal bleeding and fractures with the — due to the consequences of a crushing trauma" (T. 79). He clearly ascribed the crushing force to a wheel of the combine passing over her body. (T. 84) as did Pathologist Birkland. (T. 300). Neither has the State at any time contended that Debbie Taylor was dead before the combine ran over her. (See, generally the state's opening statement and arguments at Sup. Tr. 3-16, 27-43, 66-73).

**B.** As noted in State v. Butler, 676 S.W. 2d. 809, (Mo. 1984) the United States Supreme Court in Nix V. Williams, 467 U.S. 431 (1984), and Brewer v. Williams, 430 U.S. 387 (1977), recognized the doctrine that evidence illegally obtained may still be used, if it would inevitably have been discovered by lawful means. However, Nix and Brewer both placed the burden of demonstrating "inevitable discovery" by a preponderance of the evidence squarely on the state. It is submitted that never; not at the suppression hearing, not at the argument on defendant's new trial motion, not in its brief, and not in its argument before this court, has the state even suggested the applicability of the inevitable discovery rule, let alone demonstrated by a preponderance of the evidence that it should apply. The burden rests upon the state, because as did the state in the Williams cases, it has gone outside the adversary process, during its pendency. (cf. the complaint on appellant's

brief about "circumventing the discovery process." the Williams cases provide persuasive authority for the wrongfulness of such conduct) It is submitted that expecting the defense to anticipate and negate a possible "inevitable discovery" excuse which is never raised by the state impermissibly shifts the burden.

**C.** In resting its "inevitable discovery" ruling on the assertion that the state could still have obtained a valid search warrant, the court begs (in the classic logical sense) a key issue raised in Appellant's brief; the questionable validity of any new proceeding to obtain and introduce evidence already suppressed. Appellant's counsel are unaware of any prior case wherein a warrant issued subsequent to suppression of the same evidence was approved. The only case discovered by Appellant where the prosecution even attempted to once again obtain evidence which had been suppressed was U.S. v. Lipschitz, 148 F. Supp. 774, (E.D.N.Y. 1957), where the court disapproved the use of a subpoena for the purpose. Surely this court should have done more than take for granted that evidence once suppressed could again be seized by going through the motions of obtaining a facile valid warrant.

**D.** The Appellant's brief points out to the court, at page 60, two cases in which the judge's failure to disqualify when required to do so was apparently sufficient prejudice to invalidate the proceedings. State v. Stovall, 785 S.W.2d. 853 (1990) involved a disqualification by timely motion, where there was no evidence of actual bias on the judge's part against the defendant. More telling is State v. Martin, 671

S.W.2d., (MO. App. 1984). There, the court should have granted an untimely motion to disqualify, where he had expressed hostility to a proposed defense of justification to the charge of carrying a concealed weapon in a correctional facility. Even though the defense bordered on the frivolous, the conviction was reversed. It is suggested that the introduction of evidence seized on the warrant of a disqualified judge is also sufficient prejudice to warrant reversal.

**E.** The court reasons that because psychologists or psychiatrists were presented by the state to testify that defendant did not suffer from a mental disease or defect excluding responsibility, he was not prejudiced by the videotape, photographs, and measurements introduced by the state to negate his statement to his expert witness of just what happened at the time of Debbie Taylor's death. It has been said that an argument which proves everything proves nothing. The court's reasoning here suffers from that infirmity. That is, under this reasoning, virtually every bit of evidence tending to establish guilt may be marshaled against a finding of prejudice for introduction of tainted evidence. The theory that Debbie Taylor was struck in the face before being run over by the combine was presented to imply to the jury that her death did not occur in a manner consistent with defendant's mental disease or defect theory. The opinion testimony of mental health professionals as to what his condition was, is quite another matter. With respect to the opinions of the coroner, and the pathologist, that the facial injuries were not caused by Debbie being run over by the combine, these opinions were substantially bolstered

by the physical evidence, which was concrete and graphic. For this reason, the existence of the opinion evidence does not render the physical evidence harmless. cf. State v. Whitfield, 837 S.W.2d. 503, (Mo. 1992)

**F.** The right of confrontation, guaranteed by the Sixth Amendment to the Constitution of the United States, should not be lightly held to have been contracted away by counsel for the defendant. In this context, it should be noted that State v. Ward, 745 S.W.2d. 666 (Mo. 1988), cited in the opinion, had nothing with waiving cross-examination on a subject. The stipulation resulted in introduction of certain records, used to cross-examine the defendant, without a formal business records foundation. The court specifically noted that defendant Ward had an opportunity to testify, or introduce other evidence, if she desired, contrary to the contents of record. Also, in this case, the prosecutor apparently sought the stipulation that Debbie's problems with her mother not be mentioned, at least in part for the purpose of insulating his witness from cross-examination, when as the prosecutor expected, this witness was used to falsely imply that Debbie Taylor had shown signs of deeper marital troubles than she was willing to admit. The opinion states that contract law governs stipulations. It is difficult to see how a commercial agreement, for the mere transfer of goods or funds, could be enforced where one party was so obviously mistaken as to the intention of the other. Yet the court holds that the Defendant's due process and confrontation rights were in fact contracted away. Fundamental personal rights seem to be easier, not harder, to lose than mere property rights.

**G.** State v. Cornett, 381 S.W.2d. 64, (Mo. 1964), stands for the principle that a jury should not be placed, by parole considerations, under pressure to impose the maximum penalty. The procedural safeguard of that principle, at that time was avoidance of the mention of parole. It is a virtually identical principle that consideration of parole should not be allowed to pressure a jury into returning a verdict for a more severe offense than it would otherwise believe appropriate. The possibility of such pressure is uniquely present where first degree murder and second degree murder are submitted in the same case. Knowing that the jury is seriously considering second degree murder, but is worried over the possibility of an early parole, then it is submitted that the jury must be apprised that one convicted of second degree murder and sentenced to life is never entitled to parole, and will not even be eligible for parole for twenty five years. Failure to do so in the face of an inquiry such as was made in this matter is plain error.

For each error of fact or law stated above, it is submitted that the court should grant a rehearing, and decide the cause in the favor of the Appellant. Because the matters raised in paragraphs B through F above are matters of general importance, and because the opinion is in conflict with or misapplies the cases cited in each such paragraph, and because if in fact the law of the state is such as is set forth in the opinion, it should be reexamined, it is respectfully submitted that, if rehearing is not granted, the cause should be transferred.

RESPECTFULLY SUBMITTED

Willard B. Bunch # 19527
310 Armour
North Kansas City,
Missouri
64116
(816) 421-4334
FAX (816) 468-7266

**CERTIFICATE OF SERVICE**

I certify that a copy of the above and foregoing was mailed this 5th day of March. 1997, to: Office of the Attorney General, Attention Cheryl A. Caponegro, Post Office Box 899, Jefferson City, Missouri, 65102.

Willard B. Bunch

(letterhead bearing caption of the Missouri Court of Appeals, Western District)

April 1, 1997

IMPORTANT NOTICE

TO: ALL ATTORNEYS OF RECORD

RE: STATE OF MISSOURI, RESPONDENT~

vs .

TAYLOR, WILLIAM #517533, APPELLANT

WD# 51906

Please be advised that Appellant's motion for rehearing is OVERRULED and motion for transfer to Supreme Court is DENIED.

See Rule 83. 03,

TERENCE G. LORD
CLERK DOCKET
ATTORNEY

cc Johr Munson Morris
Willard B Bunch

**IN THE SUPREME COURT OF MISSOURI**

STATE OF MISSOURI

Plaintiff -Respondent

vs.

Circuit Court No.
CR894-481F
Court of Appeals No.
WD51906

Supreme Court No. _

Court of Appeals,

Western District
WILLIAM TAYLOR

Circuit Court
for Nodaway County

Defendant -Appellant

## APPLICATION FOR TRANSFER

Is transfer sought prior to opinion ___ or after opinion X
(Check appropriate option)

[Please complete all of the following that are applicable:]

The date the record on appeal was filed April 17, 1996

The date the Court of Appeals opinion was filed February 18, 1997

The date the motion for rehearing was filed March 5, 1997

and ruled on April 1, 1997

The date the application for transfer was

filed in the Court of Appeals March 5, 1997

and ruled on April 1, 1997

List every party involved in the case, indicate the position of the party in the circuit court (e.g., Plaintiff, Defendant, Intervenor) and in the court of appeals (e.g., Appellant or Respondent), and indicate the name and address of the attorney of record for each party. List first the parties applying for transfer and place a check mark in the space following to indicate each party applying for transfer.

| Party | | Attorney |
|---|---|---|
| William Taylor,<br>Defendant-Appellant | X | Will Bunch,<br>310 Armour Road,<br>North Kansas City,<br>Missouri 64116 |
| State of Missouri,<br>Plaintiff-Respondent | | Attorney General of Missouri,<br>P. O. Box 899,<br>Jefferson City,<br>Missouri, 65102 |

COMES NOW APPELLANT, by and through the undersigned, and applies to this court for its order transferring the cause, # WD51906, from the Western District, Missouri Court of Appeals:

**Matters of General Importance, Wherein the Law Should Be Reexamined:**

A. Error in placing the burden of negating "inevitable discovery," never claimed by the state, on the defendant.

B. The court's assumption that a search warrant can lawfully issue for items once suppressed in the same case.

C. Whether introduction of evidence obtained by a warrant issued by a disqualified judge is prejudicial in itself.

D. Whether corroborating evidence can be prejudicial.

E. Whether a stipulation should be allowed to deprive a defendant of the right of confrontation on an entire subject, where there is strong evidence of mistake.

F. Whether it is plain error not to instruct on the law with respect to possible parole from a life sentence, where both first and second degree murder are submitted.

**Conflict with or Misapplication of:**

**A.** Nix V. Williams, 467 U.S. 431 (1984)

**B.** Brewer v. Williams, 430 U.S. 387 (1977).

**C.** State v. Whitfield, 837 S.W.2d. 503, (Mo. 1992)

**D.** State v. Ward, 745 S.W.2d. 666 (Mo. 1988)

**E** State v. Cornett, 381 S.W.2d. 64, (Mo. 1964)

F. State v. Stovall, 785 S.W.2d. 853, (Mo. App. 1990)

G. State v. Pigques, 310 S.W.2d 942 (Mo. 1958)

## I. Procedural Posture, and General Facts

On February 18, 1997, the Western District of the Missouri Court of Appeals handed down its opinion, in cause no. WD 51906, affirming appellant's conviction of first degree murder and sentence to life imprisonment without eligibility for parole. The Appellant's Motion for Rehearing/Application for Transfer was filed on March 5, 1997, and overruled on April 1, 1997.

The victim was Defendant's wife, whose body was crushed by a combine at their farm. It was first thought to be accidental, Defendant, who was also run over, told the authorities when they first arrived at the scene, that his wife had attempted to get a cat out from under the combine, and been run over, and that he fell under the combine trying to save her. Later, at the hospital, he told his brother that he had killed the cat, thrown it under the combine, and caused it to run over his wife by use of a string tied to the "hydrostat lever." Taylor's defense, supported by testimony forensic psychiatrist William Logan, was mental disease or defect excluding responsibility, because of delusions that his wife was having an affair and preparing to divorce him. He continued to explain his own injuries by stating that after pulling the string to activate the lever, he realized that his actions were wrong, and tried, too late, to extricate his wife. In addition to the flimsiness of the grounds on which Taylor's belief's that his wife was about to leave him were based, he presented, in support of the theory that this belief delusional, evidence of a family life in which no harsh word, let alone violence, had passed between them. Psy-

chiatrist Logan's conclusion that the beliefs were the result of a delusional disorder were based in part on the absence of past marital problems.

The State countered this with a theory that certain injuries to Defendant's wife, as well as the physical dimensions of the combine, were inconsistent with defendant's version of the events. The state claimed a struggle occurred between them, wherein she received certain head and facial injuries., and during which defendant was pulled into the path of the moving combine. The state also sought to discredit the notion of a trouble-free family life prior to the onset of Defendant's delusions, through testimony of a psychologist who had counseled Mrs. Taylor. There appears to be no support in the record for the remarks by the Court of Appeals that there was evidence that Mrs. Taylor died of a blow to the face, or that she was first killed, then placed under the combine.

After the trial judge granted a motion to suppress photographs, diagrams, videotapes, reconstructions, etc. using the combine, as the fruits of a warrantless search, the state sought and obtained, from an associate circuit judge who had earlier disqualified himself from Defendant's preliminary hearing, a search warrant for the combine, and made several measurements, photographs, and a videotape of the combine, including the operation of the hydrostat lever, which were central to the State's "struggle theory."

A motion to suppress the fruits of the second search, and objections at trial, were overruled by the trial court. The struggle theory was vigorously argued by the State in closing argument.

The state and the defendant's attorney had stipulated that evidence of problems between the wife and her mother would not be introduced. (Defendant's psychiatrist had access

to records indicating that Mrs. Taylor had mentioned such problems when she sought counseling after losing her teaching job, and might have considered them relevant to the issue of defendant's mental disease. Defense Counsel believed that the stipulation was directed at the use of this information in the defense case in chief, particularly in the testimony of Dr. Logan). In direct examination of Mrs. Taylor's Psychologist, on rebuttal, the State elicited certain answers about a "lack of intimacy" in the marriage and different disciplinary attitudes concerning the couple's children. The state further elicited a remark that persons in counseling are frequently reluctant to tell all about family problems. The defense sought, on cross-examination to introduce testimony that Mrs. Taylor several times mentioned to the counselor problems concerning personality conflicts with her mother. Defendant's theory was that the State had created an inaccurate picture of the counseling and, in turn, their married life, by implying that there was more marital strife than Mrs. Taylor was willing to mention to her counselor, ant that her willingness to discuss her problems with her mother would have refuted this implication.

## II. Grounds for transfer

A. The Court of Appeals committed a material error of fact and/or law, in a matter of general importance, when it determined sua sponte that evidence, consisting of photographs, measurements, and a videotape of the combine which ran over the victim, all obtained pursuant to a void warrant, would have been "inevitably discovered," without placing on the state the burden of demonstrating by a preponderance of the evidence that the evidence would in fact have inevitably been discovered, and the opinion

for that reason is in conflict with Nix V. Williams, 467 U.S. 431 (1984), and Brewer v. Williams, 430 U.S. 387 (1977).

**B.** The court committed a material error of fact and/or law, when it held that the evidence seized pursuant to the void warrant would have been inevitably discovered via a valid search warrant without examining the question of whether evidence, once suppressed, can ever be validly obtained and introduced in the same proceeding. This appears to be a question of first impression in Missouri, and is a matter of general importance.

**C.** The court committed a material error of law and/or fact, when it held that even if the warrant was void because of the disqualification of the Associate Circuit Judge, there was no prejudice in the introduction of evidence seized; overlooking the historic Missouri practice of reversing the results of actions of disqualified judges without looking for further prejudice, is cases such as State v. Stovall, 785 S.W.2d. 853, (Mo. App. 1990) and State v. Martin, 671 S.W.2d. 20 (Mo. App. 1984), within which the opinion is thereby in conflict..

**D.** The court committed a material error of law or fact, when it held that appellant was not prejudiced by introduction of the videotape, photographs, and measurements of the combine, because of "independent evidence of the facts established" by the seized evidence, in that (1) the "independent evidence" was actually of other "facts;" and, (2) as recognized in State v. Whitfield, 837 S.W.2d. 503, (Mo. 1992), graphic and concrete corroborating evidence can be

prejudicial.

**E.** The court committed a material error of law and fact, and deprived the Appellant of due process of law, in holding that because of a pretrial stipulation, he was entirely precluded from bringing into the case, either by cross-examination or rebuttal evidence, the matter of his wife (the victim) mentioning discussing with her psychological counselor any problems with her mother. The trial court so ruled, even though it recognized that counsel for Appellant only intended to stipulate away the right to introduce these matters in his case in chief. The trial court thus deprived the defendant of his right of confrontation on this subject, and allowed the state to leave a jury with a false impression insulated from refutation, that the defendant and his wife had "marital problems" before the onset of the mental disease which defendant's expert psychiatric witness stated caused him to commit the offense, in violation of the principle enunciated in State v. Pigques, 310 S.W.2d 942 (Mo. 1958)

**F.** The Court of Appeals committed a material error of law and fact when it failed to hold that it was plain error for the court to fail to instruct the jury appropriately that parole is never assured to a person sentenced to life imprisonment, and that a person sentenced to life for second degree murder will not even be eligible for parole for at least twenty-five and one-half years, thus permitting the jury to be pressured to return a verdict for the more serious offense, in violation of the principle announced in State v. Cornett, 381 S.W.2d. 64, (Mo. 1964).

WHEREFORE, IT IS RESPECTFULLY SUGGESTED THAT, because each of the errors stated in subparagraphs **A** through **F** above is on a matter of general importance, upon which the law should be reexamined, and the errors in paragraphs **A, C, D, E** and **F** present conflict with, or misapplication of the cases cited therein, and this Court should order trans fer of the cause from the Western District of the Court of Appeals.

RESPECTFULLY SUBMITTED

Willard B. Bunch # 19527
310 Armour
North Kansas City,
Missouri
64116
(816) 421-4334
FAX (816) 468-7266

## CERTIFICATE OF SERVICE

I certify that a copy of the above and foregoing was mailed this , to: Office of the Attorney General, Attention Cheryl A. Caponegro, Post Office Box 899, Jefferson City, Missouri, 65102.

Willard B. Bunch

**IN THE SUPREME COURT OF MISSOURI**

| | | |
|---|---|---|
| **STATE OF MISSOURI** | ) | |
| | ) | |
| **Plaintiff-Respondent** | ) | |
| **v.** | ) | **No. _____** |
| | ) | **(Western** |
| **WILLIAM TAYLOR** | ) | **District case #** |
| | ) | **WD 51906** |
| **Defendant-Appellant** | | |

## SUGGESTIONS IN SUPPORT OF APPLICATION FOR TRANSFER FROM THE WESTERN DISTRICT OF THE MISSOURI COURT OF APPEALS

COMES NOW APPELLANT, by and through the undersigned, and in support of his Application For Transfer from the Western District, Missouri Court of Appeals, suggests to the court as follows:

A.[3] As noted in State v. Butler, 676 S.W. 2d. 809, (Mo. 1984) the United States Supreme Court in Nix V. Williams, 467 U.S. 431 (1984), and Brewer v. Williams, 430 U.S. 387 (1977), recognized the doctrine that evidence illegally obtained may still be used, if it would inevitably have been discovered by lawful means. However, Nix and Brewer both placed the burden of demonstrating "inevitable discovery" by

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[3]These letter designations agree with the designations in Part II of the Application, which in turn agree with the portion of Part I of the application designating "Matters of General Importance, etc....".

a preponderance of the evidence squarely on the state. In the instant case, the state never; not at the suppression hearing, not at the argument on defendant's new trial motion, not in its brief, and not in its argument before the Court of Appeals, even suggested the applicability of the inevitable discovery rule, let alone demonstrated by a preponderance of the evidence that it should apply.

In the Williams the Court recognized that by indulging in the "functional equivalent of questioning" after their prisoner had requested counsel, the state had gone outside the adversary process after it had been invoked; for that reason the burden of demonstrating inevitable discovery rested on the state. Clearly, by seeking *ex parte* relief (applying before a disqualified judge for a search warrant) after the adversary process had gone so far as the binding over of the Appellant for trial, the state went outside the adversary process. (As noted by appellant's brief, one specific part of the adversary process which was circumvented was the discovery process. The Williams cases provide persuasive authority for the wrongfulness of such conduct). It is submitted that for the Court of Appeals, in retrospect, to require the defense to anticipate and negate a possible "inevitable discovery" excuse which is never raised by the state impermissibly shifts the state's burden.

**B.** In resting its "inevitable discovery" ruling on the assertion that the state could still have obtained a valid search warrant, the Court of Appeals opinion begs (in the classic logical sense of "ignores") a key issue raised in Appellant's brief; the questionable validity of any new proceeding to obtain and intro-

duce evidence already suppressed. As noted in United States v. Leon, 468 U.S. 897 (1984), the test of the validity of a ruling that a case is within or outside the exclusionary rule is whether or not the ruling tends to meet the rule's goal; the deterrence of misconduct by the authorities: If the fruits of an unlawful search can be retrieved by the simple expedient of getting a new warrant, the exclusionary rule is simply defeated. Appellant's counsel are unaware of any prior case wherein a warrant issued subsequent to suppression of the same evidence was approved. The only case discovered by Appellant where the prosecution even attempted to once again obtain evidence which had been suppressed was U.S. v. Lipschitz, 148 F. Supp. 774, (E.D.N.Y. 1957), where the court disapproved the use of a subpoena for that purpose. Surely the Court of Appeals should have done more than take for granted that evidence once suppressed could again be seized by going through the motions of obtaining a facially valid warrant.

**C.** The Appellant's brief pointed out to the Court of Appeals two criminal cases in which the judge's failure to disqualify when required to do so was apparently sufficient prejudice to invalidate all following proceedings. State v. Stovall, 785 S.W.2d. 853 (1990) involved a disqualification by timely motion, where there was no evidence of actual bias on the judge's part against the defendant. More telling is State v. Martin, 671 S.W.2d., (MO. App. 1984). There, the court should have granted an untimely motion to disqualify, where he had expressed hostility to a proposed defense of justification to the charge of carrying a concealed weapon in a correc-

tional facility. Even though the defense about which the judge ventured an opinion bordered on the frivolous, the conviction was reversed. It is suggested that the introduction of evidence seized on the warrant of a disqualified judge is alone sufficient prejudice to demand reversal.

**D.** The Court of Appeals reasons that because psychologists or psychiatrists were presented by the state to testify that defendant did not suffer from a mental disease or defect excluding responsibility, he was not prejudiced by the videotape, photographs, and measurements introduced by the state to negate his statement to his expert witness of just what happened at the time of Debbie Taylor's death. It has been said that an argument which proves everything proves nothing. The opinion's reasoning here suffers from that infirmity. That is, under this reasoning, virtually every bit of evidence tending to establish guilt may be marshaled against a finding of prejudice for introduction of tainted evidence. The theory that Debbie Taylor was struck in the face before being run over by the combine was presented to imply to the jury that her death did not occur in a manner consistent with defendant's mental disease or defect theory. The opinion testimony of mental health professionals as to what his condition was, is quite another matter. With respect to the opinions of the coroner, and the pathologist, that the facial injuries were not caused by Debbie being run over by the combine, these opinions were substantially bolstered by the challenged physical evidence, which was concrete and graphic. For this reason, the existence of the opinion evidence does not ren-

der the physical evidence harmless. cf. State v. Whitfield, 837 S.W.2d. 503, (Mo. 1992)

**E.** The right of confrontation, guaranteed by the Sixth Amendment to the Constitution of the United States, should not be lightly held to have been contracted away by counsel for the defendant. In this context, it should be noted that State v. Ward, 745 S.W.2d. 666 (Mo. 1988), cited in the opinion, had nothing with waiving cross-examination on a subject. The stipulation resulted in introduction of certain records, used to cross-examine the defendant, without a formal business records foundation. The court specifically noted that defendant Ward had an opportunity to testify, or introduce other evidence, if she desired, contrary to the contents of the record. This case has the opposite result. Defendant is silenced. Also, in this case, the prosecutor apparently sought the stipulation that Debbie's problems with her mother not be mentioned, at least in part for the purpose of insulating his witness from cross-examination. When, as the prosecutor intended, this witness was used to imply that Debbie Taylor had shown signs of deeper marital troubles than she was willing to admit, defendant was precluded from showing that the prosecutor had shown her counseling in a false light. The opinion states that contract law governs stipulations. It is difficult to see how a commercial agreement, for the mere transfer of goods or funds, could be enforced where one party was so obviously mistaken as to the intention of the other. Yet the Court of Appeals holds that the Defendant's due process and confrontation rights could be and were in fact contracted away, even though the trial court clearly accepted counsel's

explanation that he had no intention of waiving his right to use the matters in cross-examination if it were made necessary by the state's broaching the subject. It would be ironic if fundamental personal rights were held to be easier, not harder, to lose than mere property rights.

**F.** State v. Cornett, 381 S.W.2d. 64, (Mo. 1964), stands for the principle that a jury should not be placed, by parole considerations, under pressure to impose the maximum penalty. The procedural safeguard of that principle at that time, was avoidance of the mention of parole. Appellant here asserts a virtually identical principle; that consideration of parole should not be allowed to pressure a jury into returning a verdict for a higher degree offense than it would otherwise believe appropriate. Where first degree murder and second degree murder are submitted in the same case, the MAI-CR instructions virtually mandate that the jury will know parole is impossible after a first degree murder conviction, but possible after a second degree conviction. This renders it highly likely that the jury will feel pressure to convict of the higher degree if there is any apprehension of an early parole. When the jury in this case inquired as to when a defendant sentenced to life for second degree murder became eligible for parole, it became obvious that the jury was seriously considering second degree murder, but was worried over the possibility of an early parole. In such circumstances, it is submitted that the jury must be apprised that one convicted of second degree murder and sentenced to life is never entitled to parole, and will not even be eligible for parole for twenty

five years. Failure to do so in the face of an inquiry such as was made in this matter is plain error.

For each error of law stated above, it is submitted that this Court should order transfer. Because the matters raised are matters of general importance, and because the opinion is in conflict with or misapplies the cases cited in each such paragraph, and because if in fact the law of the state is such as is set forth in the opinion, it should be reexamined, it is respectfully submitted that, transfer should be granted.

RESPECTFULLY SUBMITTED

Willard B. Bunch # 19527
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(stationery bearing caption of the Supreme Court of Missouri)

No. 79872
W.D. No. 51906

May Session, 1997

State of Missouri, Respondent,

vs. (TRANSFER)

William Taylor, Appellant.

Now at this day, on consideration of appellant's application to transfer the above-entitled cause from the Missouri Court of Appeals, Western District, it is ordered that the said application be, and the same is hereby denied.

STATE OF MISSOURI-Sct.

I, THOMAS F. SIMON, Clerk of the Supreme Court of the State of Missouri, certify that the foregoing is a full, true and complete transcript of- the judgment of said Supreme Court, entered of record at the May Session thereof, 1997, and on the 27th day of May, 1997. In the ahove-entitled cause

Given under my hand and seal of said Court, at the City of Jefferson, this 27th day of May, 1997.

_____Clerk

_____D.C.

**COPY OF "CRIMINAL DOCKET SHEET" ENTRY, ASSOCIATE DIVISION, NODAWAY COUNTY CIRCUIT COURT, IN *STATE OF MISSOURI V. WILLIAM TAYLOR*, #CR894-481F, FOR 1-4-95.**

1-4-95 Disqualification of Judge filed by Judge Dietrich. Cause transferred to Presiding Judge Andrews for assignment of another judge.

**SEARCH WARRANT**
**AUTHORIZING SEARCH FOR EVIDENCE OF THE COMMISSION OF A CRIMINAL OFFENSE**

**STATE OF MISSOURI, )**
**) ss.**
**COUNTY OF NODAWAY )**

**IN THE ASSOCIATE CIRCUIT COURT OF NODAWAY COUNTY**

**THE STATE OF MISSOURI TO ANY PEACE OFFICER IN THE STATE OF MISSOURI**

WHEREAS, a complaint in writing, duly verified by oath has been filed with the undersigned Judge of this court, stating that heretofore the following described personal property, to-wit:

> A 6620 John Deere Combine constitutes evidence of the commission of a criminal offense and it further appears from the allegations of said complaint that said property is being kept or held in this county and state at and in the property of William and/or Charles Taylor, R. R. 4, Maryville, Nodaway County, Missouri.

NOW THEREFORE, these are to command you that you search the premises above described within 10 days after the issuance of this warrant by day or night, and take with you, if need be, the power of your county, and, if said above described property or any part thereof be found on said premises by you, that you seize the same and take same into your possession making a complete and accurate inventory of the property so taken by you in the presence of the person from whose possession the same is taken, if that be possible, and giving to

such person a receipt for such property, together with a copy of this warrant, or, if no person be found in possession of said property, leaving said receipt and said copy upon the premises searched, and that you thereafter return the property so taken and seized by you, together with a duly verified copy of the inventory thereof and with your return of this warrant to this court to be herein dealt with in accordance with law.

Witness my hand and the seal of this court on this 20th day of July, 1995.

TIME: 11:00 A.M. _____

JUDGE OF SAID COURT

## AFFIDAVIT IN SUPPORT OF APPLICATION FOR SEARCH WARRANT

**STATE OF MISSOURI )**
**) ss.**
**COUNTY OF NODAWAY )**

I, Ben Espey, Applicant herein, being duly, sworn, appear before the undersigned Judge authorized to issue warrants in criminal cases and make this Application in Support of the issuance of Search Warrant, to search the following described person, or thing:

> The property of William and/or Charles Taylor, including all of the sheds but not the houses of William or Charles Taylor, at R. R. 4, Maryville, Nodaway County, Missouri.

and there to search for and seize, photograph or copy, and make return thereof, according to law, the following property or things:

A 6620 John Deere Combine

Applicant being duly sworn states that he has probable cause to believe that the above listed property to be searched for and seized, photographed or copied, is now located upon said described place based upon the following facts, to wit:

I have been involved in the investigation into the death of Debra Taylor as a homicide occurring on November 10, 1994. On November 10, 1994, law enforcement officials and medical personnel were summoned to an alleged arm accident at the Taylor property, R. R. 4, Box 403, Maryville, at which time William Taylor indicated that he and his wife, Debra Taylor, had

been run over by a 6620 John Deere combine. On November 12, 1994, William Taylor indicated to me that he killed his wife by intentionally running over her with the 6620 John Deere combine. I believe this combine (murder weapon) is located in one of the sheds on the Taylor property at this time.

BEN ESPEY
Sheriff, Nodaway County

Subscribed and sworn before me this 20th Day of July. 1995

Judge of the Associate Circuit Court, in and for
Nodaway County, Missouri

## RETURN AND INVENTORY

I,_____, being a peace officer within and for the aforesaid county, to-wit:

_____ do hereby make return to the above and within warrant as follows: that on the 20 day of July, 1995, and within ten days after issuance of said warrant, I went to the location and premises described herein and searched the same for personal property described therein, and that upon said premises I discovered the following personal property described in the warrant which I then and there took into my possession (here inventory of property taken):

(handwritten notation: 1 - 6620 John Deere Combine with grain table attached.)

that I made this inventory in the presence of the person from whose possession I took said property (that there was no person present from whose possession said property was taken); that I delivered to such person a receipt for the property taken, together with a copy of this warrant (that, there being no person in possession of said property, present on said premises, I left a copy of this warrant with a receipt for the property taken, in a conspicuous place on said premises), that I have now placed said property so taken in the possession of this court.

Subscribed and sworn to before me this, 21st day of July 1995.

**IN THE CIRCUIT COURT OF**
**NODAWAY COUNTY, MISSOURI**

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| **STATE OF MISSOURI** | ) | |
| | ) | |
| **Plaintiff,** | ) | |
| | ) | |
| **v.** | ) | **Case No. CR894-481** |
| | ) | |
| **WILLIAM TAYLOR** | ) | |
| **Defendant.** | ) | |

## MOTION TO SUPPRESS PHYSICAL EVIDENCE

COMES NOW defendant, Edward William Taylor, by counsel, and respectfully moves the Court to suppress any and all items of physical evidence, including but not limited to, all twine or string seized from the yards, buildings or property of defendant, along with all photographs of any alleged reenactment of the suspected crime, wherein the State alleges that a piece of twine was used to activate the combine that ran over Debra Taylor, along with all photographs of any kind taken on the property of defendant after 12:00 P.M.. (noon) on November 11, 1994, wherein said photographs were not taken pursuant to a valid search warrant, and any other evidence allegedly seized from the dwelling owned by defendant on November 11 and 12, 1994, by officers of the Nodaway County Sheriff's Office, Missouri Highway Patrol, Nodaway County Coroner and Maryville Department of Public Safety, on the grounds that said items were obtained, if at all, in violation of the rights of the defendant secured and protected by the Fourth Amendment to the United States Constitution, and Article I, Section 15 of the Missouri Constitution, and by Section 542.261 et.seq. R.S.Mo. In support thereof, defendant states:

1. On November 11, 1994, Nodaway County Sheriff Ben Espey and Coroner Earl Siebert entered upon the lands of defendant pursuant to a telephone conversation between Sheriff Espey and Wayne Taylor, brother of defendant. Wayne Taylor told Espey and Siebert that defendant had made certain incriminating statements that would indicate the defendant had placed a dead cat under the combine, and that when Debra Taylor crawled under the combine to retrieve the cat, that defendant used a piece of twine to activate the combine, and that defendant had disposed of the twine in the area of the hog shed.

   (a) At that point, Espey and Siebert began to search the property and located a piece of twine in the hog lot and seized it. They also seized other pieces of twine, along with photographs and a diagram of the hog lot twine. All of this was done without a search warrant.

   (b) At no time had defendant authorized the above search. Wayne Taylor had no ownership interest in the property being searched and Sheriff Ben Espey knew that Wayne Taylor did not live on that property. Rather, Wayne Taylor lives miles away from the property searched, and Ben Espey knew exactly where Wayne Taylor lived.

   (c) Espey and Siebert then met with Prosecuting Attorney David Baird. After that meeting, a search warrant was obtained to search the residence of defendant for evidence of divorce papers. The warrant was issued by Judge John Fraze. That search was conducted at 9:00 p.m. on November 11, 1994. No divorce papers were located,

but a pair of blue jeans and a flannel shirt were seized, and all law enforcement officers left the property, thus ending the search.

(d) Sheriff Espey, Coroner Siebert and Sgt. David Ray, an officer of the Nodaway County Sheriff's Department, returned to defendant's farm, without a search warrant, to search for additional evidence to use against defendant on November 12, 1994.

(e) On this second warrantless search, more twine was seized from different locations in the yard and out buildings of the farm. Photographs were taken of the pieces of twine where they were found.

(f) The combine was removed from the shed it was in, and a piece of twine was attached to the hydrostatic lever. Photographs were taken at each stage of this "reenactment," along with diagrams.

(g) The first warrantless search served as confirmation of the hearsay statement of Wayne Taylor. With that confirmation, Coroner Siebert conducted an autopsy of a dead cat that had previously been discarded in some woods off defendant's property. Wong Sun v. United States, 371 U.S. 472, 479, 9 L.Ed 2d 441, 450, 83 S.Ct. 407 (1963) requires the exclusion of evidence developed as a result of an illegal search. Therefore, the autopsy of the cat, and all photographs taken in connection therewith, should be suppressed.

2. Defendant did not consent to the searches and seizures complained of herein.

3. The searches herein were unlawful in that they were conducted without a warrant, without probable cause, and were not within the scope of any exception to the warrant requirement.

WHEREFORE, defendant respectfully moves the Court to suppress any evidence concerning items allegedly seized as a result of the searches complained of herein.

RESPECTFULLY SUBMITTED,

_____

WILL BUNCH #19527
1125 Grand, Suite 2000
Kansas City, Missouri 64106
(816) 421-4334

**CERTIFICATE OF SERVICE**

I CERTIFY that a copy of the above and foregoing was mailed this 31ST day of May , 1995, to: David Cosgrove, office of the Attorney General, P. O. Box 899, Jefferson City, Missouri 65102.

_____

WILL BUNCH

DANIEL M. CZAMANSKE
ASSOCIATE CIRCUIT JUDGE
DIVISION III

328 MAIN, BOX 50CH
PLATTE CITY, MO 64079
PHONE: 816-858-2232

Mr. Patrick O' Riley
Circuit Clerk, Nodaway County
P.O. Box 218
Maryville, Missouri
64468

Re: CR894-481F State v. Taylor

Dear Mr. O' Riley,

Please do a docket entry for this file as follows:

6-23-95 After consideration of the suggestions filed by the parties, the motion to suppress is sustained. The State's motion to strike is also sustained. The State shall not be permitted to enter into evidence: or refer to during the trial any matters seized by the State during the warrantless searches of November 11 and 12, 1995. None of the photos or diagrams may be used; no simulation or testing conducted during these searches may be referred to, during the trial. The cat autopsy and evidence relating thereto will be permitted.

I have mailed copies of this entry to counsel.

Thanks for your help.

Very truly yours

DANIEL M. CZAMANSKE

cc counsel of record

## CERTIFICATE OF TRUE COPY

**State of Missouri** )
) **ss.**
**County of Nodaway** )

I, Pat O'Riley, the duly elected, qualified and acting Clerk of the Circuit Court of Nodaway County, Missouri, Division I, hereby certify under my hand and seal of office that the attached and foregoing is a true and complete copy of the original

Docket Entry of 6-23-96 by letter from Judge
Daniel M. Czamanske

now of record and on file in my office.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed my official seal at my office in Maryville, Nodaway County, Missouri, on this 24th day of May, 1996.

Pat O'Riley -- Circuit Clerk

Deputy Clerk

(SEAL)

**IN THE CIRCUIT COURT OF**
**NODAWAY COUNTY, MISSOURI**

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| STATE OF MISSOURI | ) | |
| | ) | |
| Plaintiff | ) | |
| | ) | |
| | ) | |
| v. | ) | Case no. CR894-481f |
| | ) | |
| | ) | |
| WILLIAM TAYLOR | ) | |
| | ) | |
| Defendant | ) | |

## SECOND MOTION TO SUPPRESS EVIDENCE

Comes now the Defendant, by and through the undersigned, and moves the court for an order suppressing evidence obtained as a result of a warrant issued on 20 July, 1995, and executed on the same date, said evidence consisting of a 6620 John Deere combine, and a videotaped demonstration, experiment, or reenactment conducted with the use of said combine, for the following reasons.

1. The issuing judge had disqualified himself from this cause, and had in fact a disqualifying interest in the cause.

2. The affidavit in support of the Complaint for Warrant did not state facts from which it could be concluded that the combine was present on the residential property of Charles Taylor, or near any residence other than that of the Defendant himself.

3. The information on which the Affidavit is based was

obtained as a result of unlawful searches and seizures.

## I. DISQUALIFICATION OF THE ISSUING JUDGE

1. The warrant was issued by Associate Circuit Judge Glen Dietrich, on July 20, 1995.

2. On the Docket of this case, in the Associate Circuit Judge Division, at January 4, 1995, appears the notation "Disqualification of Judge filed by Judge Dietrich. Cause transferred to Presiding Judge Andrews for assignment of another judge."

3. Associate Circuit Judge Dietrich has additionally disqualified himself from several other causes arising out of the death of Debra Taylor, including the Probate Estate, case number not known to this Defendant, a Petition for Discovery of Assets of Decedent's estate, Case # CV 1194-88P, and petitions to appoint guardians for the Taylor children, case No CV 1194-97P.

4. At the time of the filing of the above causes, and up until his assumption of the bench, Judge Dietrich was a member of the firm of Zahnd, Dietrich, and Ross. Scott Ross, of said firm, undertook to represent the survivors of Debra Taylor in the above-designated causes of action, and in a wrongful death action arising out of the killing of Debra Taylor, while Judge Dietrich was a partner in the firm. The foregoing is an inherently disqualifying interest, and the evidence obtained from the search authorized by Judge Deitrich must be suppressed.

## II. THE INSUFFICIENCY OF THE AFFIDAVIT

1. The affidavit recites facts from which it may be concluded that a combine was the instrument of death of Debra

Taylor, but then goes on to state, with no supporting facts, that the affiant believes that the combine is stored on property of Charles or William Taylor. This conclusory assertion cannot support issuance of a search warrant.

## III. THE FRUIT OF AN ILLEGAL SEARCH

1. This court has suppressed evidence obtained in two warrantless searches of the defendant's property, conducted on November 11 and November 12, 1994.

2. The fruits of these searches included a videotape of the operation of the combine which caused the death of Debra Taylor, and the knowledge of how the combine could be made to operate by pulling a string attached to a hydrostatic lever.

3. The whole purpose of the complaint for warrant, in order to obtain authority for the July 20 search, was to recreate the experiment/reenactment conducted in conjunction with the prior search, and to thus make use of the knowledge obtained from the unlawful search.

4. Under the "fruit of the Poisonous Tree" doctrine, as applied in Nardone v. United States, 308 U.S. 338, (1939) and Wong Sun v. United States 371 U.S. 471( 1963), the evidence must be suppressed.

Wherefore, it is respectfully requested that the aforesaid evidence be suppressed, for each and all of the foregoing reasons.

RESPECTFULLY SUBMITTED

Willard B. Bunch # 19527
1125 Grand, # 2000
Kansas City,
MO 64106
(816) 421-4334
FAX (816) 421-3983

**CERTIFICATE OF SERVICE**

I certify that a copy of the above and foregoing was mailed this ____ day of 1995, to: David Cosgrove, Office of the Attorney General, P. O. Box 899, Jefferson City, Mo 65102.

Willard B. Bunch

**IN THE CIRCUIT COURT OF**
**NODAWAY COUNTY, MISSOURI**

| | |
|---|---|
| **STATE OF MISSOURI** | ) |
| | ) |
| **Plaintiff** | ) |
| | ) |
| | ) |
| **v.** | )**Case no. CR894-** |
| | ) **481f** |
| | ) |
| **WILLIAM TAYLOR** | ) |
| | ) |
| **Defendant** | ) |

## MOTION FOR JUDGMENT OF ACQUITTAL OR IN THE ALTERNATIVE FOR A NEW TRIAL

COMES NOW THE DEFENDANT, and moves the court for a judgment of acquittal, or in the alternative for a new trial, for the reasons set forth in the following paragraphs:

1. The videotape demonstration using the combine, and all other evidence, demonstrative or testimonial, including but not limited to Exhibits 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, and 27, derived from the July 20, 1995 search of defendant's property and seizure of the combine, were obtained as the result of a search conducted pursuant to a warrant that was absolutely void, because the issuing judge had a disqualifying interest in the cause, had in fact disqualified himself, and was not a detached and neutral magistrate, as required by the Fourth Amendment to the Constitution of the United States, by Article I section 15 of the Constitution of the State of Missouri, and by Section 542.276, R. S. Mo. Defendant was prejudiced by the Court's admission of the evidence, especially the videotape,

and testimony based on it and upon examination of the combine, because it was the sole evidence used by the state to give the impression that the defendant deliberately struck the deceased, knocked her unconscious, and then threw her body under the combine. For the Court's convenience in considering this and the following three paragraphs, a copy of the docket sheet evidencing the Associate Circuit Judge's disqualification of himself is attached hereto and marked as "exhibit A." For the court's convenience in considering all matters concerning the disqualifying interest of Judge Dietrich, a series of letters, pleadings, and other documents generated by his former law firm is attached hereto as Exhibit "B". Further, defendant incorporates herein by reference the additional arguments made in the Defendant's Motions to Suppress, Motion in Limine, and oral argument made at trial on this issue.

2. The state's claim that even if the warrant was void, the evidence obtained was admissible is specious. The Attorney General had actual knowledge that the Judge's former partner represented the estate of the decedent, because of the partner's participation on behalf of the estate, in a deposition conducted in conjunction with this cause. The Sheriff and the Attorney General were both involved in the case when the judge disqualified himself, on the public record. Under such circumstances, the State should not be heard to claim "objectively reasonable" reliance on the detachment and neutrality of the judge. For the court's convenience in consideration of this and the following two paragraphs, the Application, Affidavit, Search Warrant, and Return, concerned with the second search are attached hereto as "Exhibit C." For the court's convenience in consideration of this and the following two paragraphs, a copy of a portion of the transcript of the deposition of Kenneth Thom is attached as Exhibit "D". Further, defendant incorporates herein by reference the additional arguments made in the

Defendant's Motions to Suppress, Motion in Limine, and oral argument made at trial on this issue.

3. The Affidavit in support of the Application for Search Warrant was inadequate in that it stated only the Sheriff's conclusion that he believed the combine was present at the Taylor property, without stating any facts upon which the belief was based. He had no right to place "objectively reasonable" reliance upon a warrant issued pursuant to a defective affidavit for the contents of which he was responsible. Further, defendant incorporates herein by reference the additional arguments made in the Defendant's Motions to Suppress, Motion in Limine, and oral argument made at trial on this issue.

4. Even if the affidavit was sufficient, key information upon which it was based was learned by the Sheriff as the result of the unlawful first search. Because the Sheriff and the Assistant Attorney General had actual knowledge of the suppression of evidence obtained in the first search, they cannot claim to have relied, in an objectively reasonable manner, on the warrant, knowing that it was obtained with an affidavit based on illegally obtained information. Further, defendant incorporates herein by reference the additional arguments made in the Defendant's Motions to Suppress, Motion in Limine, and oral argument made at trial on this issue.

5. The Court was without jurisdiction to try the Defendant for Murder in the First Degree, because the Information was a nullity.

a. The Assistant Attorney General who purported to appear as a Special Assistant Prosecutor was neither appointed by the Court, directed by the Governor to assist the Prosecuting Attorney, under Section 27.030, Revised Statutes of Missouri, nor directed by the Court to sign indictments, pursuant to said statute.

b. The Attorney General did not send an Assistant to aid the prosecutor in the conduct of a trial as "second chair," which might have been appropriate without appointment by the Governor or the Court. Rather, the duly elected and serving prosecutor of the County withdrew from the cause, and the Assistant Attorney General arrogated to himself the control of the case without authority.

c. The Assistant Attorney General had no authority to confer upon the court jurisdiction over the cause of Murder in the First Degree by signing the Information.

6. There was insufficient evidence to justify a rational trier of fact in concluding that the defendant was sufficiently free from mental disease or defect to have the culpable mental state necessary to commit the offenses, and the court erred in submitting each offense to the jury. A rational trier of fact could not reasonably find beyond a reasonable doubt that the defendant acted knowingly, or after cool reflection.

7. The evidence on the mental condition of the defendant clearly established, as a matter of law, that he suffered a mental disease or defect, which rendered him unable to know or appreciate the nature quality or wrongfulness of his conduct, or incapable of conforming his conduct to the requirements of the law.

8. Even if there was sufficient evidence to justify a rational trier of fact in concluding that the defendant was sufficiently free from mental disease or defect to have the culpable mental state necessary to commit the offenses submitted to the jury, the finding beyond a reasonable doubt that he was not suffering from such a mental disease or defect was against the weight of the evidence.

9. Even if the evidence on the mental condition of the de-

fendant did not clearly establish, as a matter of law, that he suffered a mental disease or defect, which rendered him unable to know or appreciate the nature quality or wrongfulness of his conduct, or incapable of conforming his conduct to the requirements of the law, the finding of the jury that he did not have such a mental disease or defect was against the weight of the evidence.

10. The court erred, when, in reply to a direct inquiry of the jury concerning the "length" of a life sentence for second degree murder, it merely referred the jury to instructions already given.

a. The court should have instructed the jury that under the statutes applicable to the instant cause, a person sentenced to life for second degree murder must serve a minimum of twenty-five and one-half years before becoming eligible for parole, and that there is no requirement in the law that any person sentenced to life imprisonment ever be released.

b. The jury was already necessarily considering the possibility of parole, because it had been told that the sentence for Murder in the First degree was life imprisonment without parole.

c. The jury necessarily would have inferred that a sentence merely to "life imprisonment" left open the possibility of parole.

d. The jury's question clearly demonstrates that the jury was contemplating the possibility of a Second Degree Murder conviction, but was concerned that defendant might be released early.

e. Because the jury's consideration of all alternative verdicts was chilled by its worry about parole, the defendant was

deprived of fundamental fairness and due process of law, under the Fifth Amendment to the Constitution of the United States, and Article I, Section 10, Constitution of Missouri.

11. Even if it was not error to fail to advise the jury that it would be at least twenty five and one-half years until defendant became eligible for parole, the court should at least have instructed the jury not to consider or speculate on when or whether the defendant would be paroled, should they determine to convict him for Second Degree Murder and sentence him to life.

12. The court erred, when it failed to give Instructions A, B, and C, offered by Defendant, based respectively on M.A.I.-CR 313.08, 308.03, and 306.02, relevant to a submission of voluntary manslaughter, because the evidence of a physical struggle between the defendant and the decedent, could have resulted in the jury finding Defendant not guilty of either degree of murder, but guilty of voluntary manslaughter.

13. Plain error, and manifest injustice resulted when the prosecutor was permitted to present Coroner Seibert, who is a Laboratory Technician, not a physician, as an "expert" to testify to his conclusions.

a. Seibert testified that he concluded that decedent had been struck and knocked unconscious before being run over by the combine, because she had bruises on her face that he concluded could not have been caused by being run over by the combine, but were in his opinion "classic shiners," caused by intentionally inflicted blows to the facial area.

b. The state had never before disclosed its intention to present Seibert as an expert witness on cause of death, and at his deposition, Seibert specifically responded in the negative to questioning by defense counsel as to his possession of any

further information concerning the case.

c. This was a direct violation of Rule 25.08, Missouri Supreme Court Rules, and a circumvention of Rule 25.03 (A) (5). The nondisclosure prejudiced defendant in several ways.

d. The state was able to discredit defense expert, Dr. Bonita Peterson, presented in response to this testimony, by reason of her limited familiarity with the case, and the fact that she had only a few hours to prepare to testify, even though this limited time was a direct result of the State's wrongdoing.

e. If believed, the evidence given by Seibert increased the heinous appearance of the crime in the eyes of the jury.

f. If believed, the evidence destroyed Defendant's assertion that he had tried to rescue his wife at the last minute;

g. If believed, the evidence destroyed defendant's credibility by contradicting defendant's versions of the events given in his "confession" or interviews with his psychiatrists.

h. If believed, the evidence portrayed defendant as a cold, calculating murderer and thus caused the jury to dismiss the defense of Mental Disease or Defect excluding responsibility.

i. Earlier disclosure of Seibert's opinion testimony would have permitted early employment of an expert to analyze and criticize Seibert's conclusions.

14. The state further violated or circumvented rule 25.03(A) (5) by reason of the failure of Seibert, an officer of the state, to make notes, reports, or written memoranda of the results of his tests, examinations, and comparisons.

a. The defense was actively misled into believing it had been given notes and reports of all of the in-

quiries and studies conducted by Mr. Seibert, whose notes as to all other aspects of his participation in the investigation were very detailed.

b. The cessation of notetaking amounted to deliberate deception by silence.

c. Defendant was prejudiced by the deception cited in this paragraph in like manner to the prejudice discussed in the foregoing paragraph.

15. Defendant was prejudiced by a violation of the court's order limiting publicity in the cause, in that flash photographs were taken of defendant in the courthouse, on the second day of trial.

16. The Court erred when it permitted the state to introduce a videotaped "reenactment" of the alleged murder, without laying a proper foundation, to wit: that the reenactment was substantially similar to the event as it occurred.

17. The court erred in allowing the testimony of Dr. Stephan Jarvis, to the effect that Defendant was not at the time of the alleged murder suffering from a mental disease or defect.

a. Dr. Jarvis was one of 28 persons endorsed as possible witnesses by the State employed at or formerly employed at Heartland Hospital, but the state had indicated to counsel for the Defense that it would "not call more than 5" persons from Heartland.

b. Dr. Jarvis was at this time no longer employed at Heartland. He was employed at the University of Missouri at Kansas City, but his present location was not divulged to the Defendant.

c. The state never divulged to the defense that it considered Dr. Jarvis an "expert" witness on the mental state of De-

fendant.

d. The "burying" of this witness's name among numerous other possible witnesses was the functional equivalent of nondisclosure.

e. Further it was obvious from the testimony that the State had conducted ex-parte interviews with Dr. Jarvis, who was defendant's private treating physician, immediately after the events, without any disclosure of this fact to Defendant's counsel.

f. Defendant was prevented from conducting effective pre-trial discovery, including depositions of this witness. If permitted to do so, Defendant would have been prepared at trial to counter the testimony of this witness, including his preposterous claim that he never takes notes of his interviews with patients.

18. Admitting the testimony of Dr. Jarvis was further improper, for violation of the Patient-Physician privilege. R.S. Mo. 491.060 renders incompetent all physicians, consulted in their capacity as physicians or counselors, as to communications from the patient to the physician made for the purpose of obtaining treatment.

19. The jury was not instructed, pursuant to M.A.I.-CR 300.02, concerning the limitation of use of a psychiatric witness's testimony before Dr. Jarvis testified.

20. The court unduly limited cross-examination of Kenneth Thom, the psychological counselor of Decedent. The court prohibited Counsel from asking the question "If Mrs. Taylor would have been having marital problems, would that have come up during the counselling sessions?" The expected answer was "yes," as indicated by deposition testimony. By prohibiting this question, and also by preventing inquiry into facts

tending to support this opinion, including that the Decedent freely discussed problems in her relationship with her mother, the court permitted the state to the falsely imply to the jury that there was or could have been significant marital discord between the Taylors, and that marital discord was the principal reason for the decedent's seeing Mr. Thom. The court further erred in rejecting Defendant's Exhibit ZZZ, the records of decedent's consultations with Mr. Thom, which were relevant for the same reasons.

21. The court erred in the order of instructions given, in that the court gave MAI-CR 308.03, "Mental Disease or Defect Negating Culpable Mental State" as instructions 8 and 11 respectively, each coming immediately after the instructions submitting Mental Disease or Defect Excluding Responsibility, M.A.I.-CR 306.02A.

a. When the issue of Mental Disease or Defect Negating Culpable Mental State, is injected into the case, the state bears the burden of proving beyond a reasonable doubt that the defendant did not have a Mental Disease or Defect negating Culpable Mental State, in accordance with R.S.Mo. 552.015.2 (8).

b. The "Culpable Mental State" instructions were juxtaposed with the "Mental Disease or Defect Excluding Responsibility" instructions, which impose upon the defendant the "burden to prove by the greater weight of the evidence," that he had a mental disease.

c. In so doing, the court confused the jury concerning the burden of proof, and relieved the State of the burden of proving the culpable mental state beyond a reasonable doubt. (M.A.I.-CR 308.03, Notes on Use, Note 3).

d. The 308.03 instructions should have each been positioned, as suggested by Defendant, before the verdict director

to which each referred.

22. The court erred by refusing to give an instruction as requested by the Defendant on "Abandonment," in the face of evidence that Defendant not only abandoned his attempt to kill his wife, but actively tried to save her. It is a denial of equal protection of the laws, guaranteed by the Fourteenth Amendment to the Constitution of the United States to permit a person accused of acting in concert with others to submit an abandonment instruction, but to deny an abandonment instruction for another person solely because he is accused of acting alone, regardless of any other circumstances of the case.

23. The Attorney for the State committed plain error in his closing argument when he asked the jury to consider a longer piece of string which was allegedly used to pull the hydrostatic lever on the combine, and cause it to start up, and then was thrown into the hog lot.

a. The longer piece of string was suppressed by this court, in response to Defendant's first Motion to Suppress.

b. The only admissible evidence mentioning the longer piece of string was in the testimony regarding psychiatric evaluations of the Defendant.,

c. Use of statements made during psychiatric and psychological examinations is limited by law to the sole purpose of determining his mental state.

d. There was no admissible evidence before the jury which could legitimately be considered as evidence of the actual existence of the longer piece of string.

24. Mr. Scott Ross, employed by the Estate of the Decedent, interjected himself in to the prosecution to such an extent that he became a private prosecutor.

a. In one instance Mr. Ross prevented a witness from answering questions posed in deposition by Defendant's counsel. The Attorney for the State took his cue from Mr. Ross in the conduct of this deposition, and advised Mr. Ross that the State would reimburse half of any fees imposed by the court as a result of action to compel compliance with discovery rules.

b. The Attorney for the State and the aforesaid private attorney cooperated in an attempt to cause the Juvenile court to restrict visitation between the children of the decedent, and his brother and sister-in-law, ostensibly for the reason of preventing "witness tampering" by the defendant, who lived one mile away from the house where the visitation was conducted.

c. The court's attention is called to Exhibit "D" hereto, a partial transcript of the deposition of Mr. Thom, and to exhibits "E" and "F" a letter from the Assistant attorney general concerning the juvenile proceedings, and a partial transcript of the juvenile hearing in question, respectively.

25. The defendant ordered expedited preparation of a transcript of the trial for use in conjunction with drafting and presenting this motion, but said transcript is not yet completed, through no fault of the defendant. The defendant will file supplemental suggestions after the completion of the transcript, which will include transcript page citations, factual corrections where necessary, quotes where appropriate, and suggestions of law after completion of the transcript.

For each of the foregoing reasons, the verdict cause should be either:

A. Set aside and a directed verdict of acquittal entered and the defendant ordered discharged, for the reasons set forth in paragraphs 6 and 7 herein.

B. Set aside and the Cause dismissed, for the reason

set forth in paragraph 5 herein.

C. Set aside and the Defendant granted a New Trial, for the reasons set forth in paragraphs 1 through 4, and 8 through 24 herein.

RESPECTFULLY SUBMITTED

Willard B. Bunch # 19527
1125 Grand, # 2000
Kansas City,
MO 64106
(816) 421-4334
FAX (816) 421-3983

## CERTIFICATE OF SERVICE

I certify that a copy of the above and foregoing was mailed or hand delivered this ____ day of 1995, to: David Cosgrove, Office of the Attorney General, P. O. Box 899, Jefferson City, Mo 65102.

Willard B. Bunch

## POINTS RELIED ON

I THE COURT ERRED WHEN IT FAILED TO SUPPRESS THE FRUITS OF A SEARCH CONDUCTED PURSUANT TO A PURPORTED WARRANT ISSUED BY ASSOCIATE CIRCUIT JUDGE GLENN DEITRICH ON JULY 20, 1995. ORDERS ISSUED BY A DISQUALIFIED JUDGE ARE ABSOLUTELY VOID, AND JUDGE DEITRICH HAD DISQUALIFIED HIMSELF FROM THE CAUSE ON JANUARY 4, 1995. THE SAME JUDGE HAD DISQUALIFIED HIMSELF FROM A RELATED PROBATE DIVISION CASE, STATING ON THE RECORD THAT THE DISQUALIFICATION WAS BECAUSE OF CONFLICT OF INTEREST. THE DEFENDANT TIMELY RAISED THIS ISSUE AND HAS PRESERVED IT THROUGHOUT THE PROCEEDINGS. THE WARRANT WAS FURTHER INVALID, BECAUSE IT WAS ISSUED ON THE BASIS OF AN AFFIDAVIT WHICH STATED ONLY CONCLUSIONS, NOT FACTS. DEFENDANT WAS PREJUDICED BECAUSE THIS RULING PERMITTED THE STATE TO :

A: CIRCUMVENT THE COURT'S PREVIOUS ORDER SUPPRESSING EVIDENCE OBTAINED IN AN ILLEGAL WARRANTLESS SEARCH AND USE THE FRUITS OF THE ILLEGAL SEARCH TO OBTAIN A WARRANT;

B: CIRCUMVENT THE RULES OF DISCOVERY

C: SUBSTANTIALLY UNDERMINE THE DEFENSE THEORY OF MENTAL DISEASE OR DEFECT EXCLUDING RESPONSIBILITY, BY PRESENTING TO THE JURY A THEORY THAT THERE HAD BEEN A STRUGGLE BETWEEN DEFENDANT AND DECEDENT, IN CONTRA-

DICTION TO THE STATEMENTS MADE BY DEFENDANT TO THE DEFENSE PSYCHIATRIST. THE "STRUGGLE" THEORY WAS SUPPORTED LARGELY BY PHOTOGRAPHS, MEASUREMENTS AND A VIDEOTAPE OF THE COMBINE, ALL MADE AFTER IT WAS SEIZED UNDER THE PURPORTED AUTHORITY OF THE WARRANT, AND THE TESTIMONY OF CORONER EARL SEIBERT, KEY PORTIONS OF WHICH WERE CONCEALED FROM DEFENDANT IN CIRCUMVENTION OF THE DISCOVERY RULES.

D CONCEAL THE "STRUGGLE THEORY" FROM THE DEFENSE, UNTIL IT WAS BROACHED AT THE PROSECUTION'S OPENING STATEMENT

## PREJUDICE:

### A. CIRCUMVENTING THE ORDER SUPPRESSING EVIDENCE

The defendant's original Motion to Suppress Physical Evidence was directed at, among other things, "all photographs of any alleged reenactment of the suspected crime, wherein the State alleges that a piece of twine was used to activate the combine that ran over Debra Taylor, along with all photographs of any kind taken on the property of defendant after 12:00 p.m. (noon) on November 11, 1994," (L.F. 107), and the court's order, in part, was that "None of the photos or diagrams may be used; no simulation or testing conducted during these searches may be referred to during the trial." This included photographs, and a demonstration or reenactment done after the combine was removed from its storage shed. (L.F. 118).

The results of the second search allowed the state to almost completely regain the ground lost by the judge's first ruling. The state never introduced a long piece of twine, seized in the warrantless search, but was able to photograph, measure, and videotape the combine to its heart's content. Permitting the State to re-seize suppressed evidence by obtaining a new search warrant while the prosecution is still going on is questionable practice, at best. If the remnants of the Exclusionary Rule are to have any deterrent effect, it is counterproductive to permit the state, after conducting an unconstitutional search and seizure to get "another bite at the apple."

Defendant cannot directly cite to this court a case wherein a "second search," pursuant to a warrant issued after suppression of evidence has been either approved or disapproved, but suggests that this practice is similar to at least two other approaches which have been disapproved.

In United States v. Lipshitz, 148 F. Supp. 774, (E.D.N.Y., 1957) the government obtained information about defendant's accountings and bookkeeping practice by the use of an undercover agent, who surreptitiously examined defendant's files. The court ordered the evidence suppressed. The government obtained a subpoena duces tecum for defendant's accountants, calling for production of the same records. The court regarded this use of the subpoena power of the court abusive, and an attempt to avoid the effect of the suppression order. The subpoena was quashed.

Attempts to save a completed, or ongoing search, by getting a warrant while the search is being conducted, or immediately after, are also regarded by the courts with a jaundiced eye. In State v. Hicks, 707 P. 2d. 531, (Az App., 1958), police were in an apartment, responding to a call about a shot fired through the floor into the apartment below. No one was present when the police entered. Besides legitimately looking for weapons and a possible shooter, an officer moved an expensive-looking piece of electronics equipment, noted the serial number, and obtained a search warrant based on a finding the serial number on a list of stolen property. The court held that the original illegal search tainted the subsequently obtained warrant. Similar results have ensued, where the officer seeks ad obtains a warrant, while the search is already going on. Thomas v. State, 220 P. 977 (Ok. Crim App. 1932). See also People v. Scaramuzzo, 185 N.E. 578, (Ill. 1983); Commonwealth v. Black, 576 A. 2d., 423; People v. Rocha, 312 N.W.2d 657 (Mich., 1981); State v. DeLane, 503 A.2d. 903 (N.J. ); Stewart. v. State, 681 S.W.2d 774 (Tex. )

## INSTRUCTION NO. 6

If you find and believe from the evidence beyond a reasonable doubt:

First, that on or about the 10th day of November, 1994, in the County of Nodaway, State of Missouri, the defendant caused the death of Debra Taylor by causing a combine to run over her, and

Second, that defendant was aware that his conduct was practically certain to cause the death of Debra Taylor, and

Third, that defendant did so after deliberation, which means cool reflection upon the matter for any length of time, no matter how brief, then you will find the defendant guilty of murder in the first degree, unless you find and believe from the greater weight of the credible evidence that the defendant is not guilty by reason of a mental disease or defect excluding responsibility as submitted inInstruction No. 7 .

If you do find the defendant guilty of murder in the first degree, you are to assess and declare the punishment at imprisonment for life without eligibility for probation or parole.

MAI-CR 3d 313.02

Submitted by the State. FILED

## INSTRUCTION NO. 9

If you do not find the defendant guilty of murder in the first degree, you must consider whether he is guilty of murder in the second degree under this instruction.

If you find and believe from the evidence beyond a reasonable doubt:

First, that on or about the 10th day of November, 1994, in the County of Nodaway, State of Missouri the defendant caused the death of F I L E Debra Taylor by causing a combine to run over her, and

Second, that defendant was aware that his conduct was practically certain to cause the death of Debra Taylor, or that it was the defendant's purpose to cause serious physical injury to or cause the death of Debra Taylor,

then you will find the defendant guilty of murder in the second degree, unless you find and believe from the greater weight of the credible evidence that the defendant is not guilty by reason of a mental disease or defect excluding responsibility as submitted in Instruction No. 10.

If you do find the defendant guilty of murder in the second degree, you will assess and declare one of the following punishments:

1. Life imprisonment.

2. Imprisonment for a term of years fixed by you, but not less than ten years and not to exceed thirty years

MAI-CR3d 313.04 and 304.02

Submitted by the State.

## EXCERPT FROM TRANSCRIPT, PAGE 884

everybody else either go on the first floor level or outside of the courthouse while the jury is deliberating. I think counsel would appreciate that. The jury probably would appreciate it and the Court would.

The jury, like I said, has given us a note. We are just responding to that note and sending back the exhibits. That's the status of the matter at this time. Thank you.

(The exhibits were sent to the jury at 2:10 p.m. The Court was in recess until 3:50 p.m. when the Court received a question from the jury. The following proceedings were had, outside the presence and hearing of the jury:)

THE COURT: The Court has received a question from the jury at 3:50 p.m. this date which says, "A second degree life imprisonment, how long is a life sentence? Of that life sentence, what is the minimum number of years before being eligible for parole? Signed Bill Job, foreman."

THE COURT: There is a--- Please be guided by the Court's instructions.

MR. COSGROVE: Previously given to you or something like that?

THE COURT: No. I'm not--